

## CHAPTER SIX

### CATEGORIES OF SELF-DETERMINATION CLAIMS IN THE POST-COLONIAL CONTEXT

The origins of post-colonial self-determination claims vary widely depending on the peculiar circumstances in which each claimant group finds itself. Because of such variations, any prescriptions or policy-oriented analyses that do not take account of the empirical basis of separatist organizations would offer little help in resolving post-colonial self-determination disputes. In this chapter, it is intended to analyse the origins of separatist groups, the claims made by the groups and the solutions adopted to redress or contain the claims. For our purposes, post-colonial self-determination claims would be broadly classified according to their origins and bases. The classification will be called *claim categories*.

On the strength of past and present cases, it is possible to identify claims based on:

- (1) Historical and or continuing tradition of autonomy
- (2) Deprivations of security
- (3) Deprivation or destruction of fundamental ethnic or cultural heritage
- (4) Racial discrimination
- (5) Religious differences
- (6) Disparities in the distribution of wealth and power
- (7) Territorial recovery
- (8) Absence of consent for the original association with the parent state or some other form of illegality.

It must be emphasized that the claim categories are only broad generalizations. They are neither water-tight nor exhaustive. A given

claim could fit into more than one category depending on its peculiar circumstances. In this discussion what determines the category of a claim is the major factor underlying that claim.

Our interest in this chapter is the factual discussion of empirical claims made. The legal validity of the basis of such claims in international law will be discussed in Chapter Seven. A comprehensive list of claimants is provided in Appendix V.

#### 1. HISTORICAL OR CONTINUING TRADITION OF AUTONOMY

Arguably, the constituent communities of most plural states have been autonomous at some states in history. This is particularly true in respect of the ethnic groups in the new states or former colonies and the 'older' nationalities that make up the majority of states in Europe. In the new states, while the incidence of historical autonomy may serve as a source of ethnic pride,<sup>1</sup> it is hardly ever used as a basis of separatist agitation. Where it has been used, it has usually played a secondary role of reinforcing some other pre-existing grievance.<sup>2</sup> Among some of the older European nationalities, the case is different. The nostalgia of past autonomy provides more than a sense of pride. It constitutes the primary basis for separatist activity and the *raison d'être* for the persistent rejection of the centralised state system. For these groups, the past provides the foundations for the present day desire for autonomy or independence. They see in the modern developments in the principle of self-determination, a basis for legitimacy.<sup>3</sup>

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1. The Baganda of Uganda, and Ashantis of Ghana for instance take great pride in their ethnicity. Both the Baganda and the Ashanti constituted vast empires in pre-colonial times.
  2. In Biafra for instance, the Ibo's sense of ethnic parochialism was only developed to support their secession after genocidal acts were committed against them. See a discussion of the Biafran case in pages 212-215, *infra*.
  3. Other older nationalities in this category include the Basque,  
(contd)

In this claim category one would include the following cases:

#### THE CATALANS OF SPAIN

The Catalan region of Spain occupies the north-eastern triangle of the Iberian Peninsular. Covering a total surface area of about 12,426 sq. miles, it comprises the four provinces of Barcelona, Geronia, Lerida and Tarragona. In the fourteenth century, the region constituted an autonomous unit with the constitutional federation of the Crown of Aragon.<sup>4</sup> It was twice occupied by France between 1640 and 1697.<sup>5</sup> It nevertheless continued to enjoy an autonomous status after this period till 1716 when it was integrated into the Hispano-Hapsburg system and its special status abolished.<sup>6</sup> From the beginning of the eighteenth century onwards, Catalan nationalism became a feature of Spanish politics with the Catalans agitating for a return to their federal autonomous status.

Despite the fluctuating activities of Catalan nationalists it was not until 1912 that Spain recognized the region's "right of *Mancomunitat*, or unification of existing functions of provincial administration under regional federations".<sup>7</sup> The semblance of autonomy that Catalonia enjoyed under this arrangement was short-lived. In 1924 a military dictatorship in Spain abolished all forms of regional autonomy.<sup>8</sup> Catalan separatism again emerged with full zeal. In 1931,

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3. (contd) Corsicans and Bretons of France, the Frisians of Holland, the Armenians, and the Scots and Welsh of the United Kingdom. The possible parallel to such older nationalities outside Europe include the Kurds and the Nagas.

4. Payne, "Catalan and Basque Nationalism", Contemporary History, Vol. 6, 15-51 at 15. The incorporation of the region into the crown system of Aragon was the result of the marriage between Count Raymond Berenger IV of Barcelona and Petronilla of Aragon.

5. Phillip IV initially gave up the territory to France under Louis XIII in 1640. It was restored in 1659, But between 1694 and 1697 France came to occupy the territory again.

6. Note 4. 7. *Id.*, 27.

8. The dictatorship was under General Miguel Primo de Rivera (*id.*, 31).

Catalan nationalists seized control of the local government and declared the "Republic of Catalonia within the Democratic Republic of Spain". When this action was supported by 80% of Catalans in a plebiscite, the Spanish Parliament approved of the new status of the region.<sup>9</sup>

Notwithstanding the unique position of Catalonia within Spain, extreme nationalists demanded complete autonomy. The separatist demands precipitated riots in 1934, and caused the central government to suspend all the powers of the Catalanian government.<sup>10</sup> When the Spanish Civil War broke out, with the central government in disarray, Catalan separatism came alive again and the region established itself as a *de facto* state.<sup>11</sup> However, in 1937 all aspects of Catalan particularism and autonomy were terminated when Franco's forces won the civil war and took control of Spain. This sparked off a new wave of Catalan separatism.

*Demands:* As far back as 1895 Catalan nationalists explained that their chief objective was not secession but a desire for regional autonomy to help develop Catalan culture, economy and traditions.<sup>12</sup> Regional autonomy still remains the principle aim of contemporary separatism. It is regarded as an honest desire to save Catalan society from the divisive individualism of Spanish culture.<sup>13</sup> Apart from the riots of 1934 and a few isolated incidents of terrorism, Catalan nationalists generally pursued solutions to their demands through the established parliamentary processes with Spain, with the aid of regionally-based

9. *Id.*, 40.

10. *Id.*, 41-42.

11. This was only from the period of July 1936 to May 1937. From the middle of 1937 onwards the war-front shifted to the north-east of Spain. The Republican capital moved to Barcelona and with this came an increase in central control over the region (*id.*, 45-46). On the Spanish Civil War, see generally the works of Thomas, *The Spanish Civil War*; Jackson, *The Spanish Republic and Civil War* (1964); Payne, *The Spanish Revolution* (1970), quoted in Payne, *op.cit.*, note 4, 45.

12. Payne, *op.cit.*, note 4, 22.

13. *Ibid.*



political parties.<sup>14</sup>

After several years of separatist repression under Franco's regime, Catalan claims have come to be recognized by the government of King Juan Carlos. In September 1977, a special state decree granted home rule to the Catalans.<sup>16</sup> Even though autonomy was limited to local matters only, the decree has helped reduce Catalan separatist agitation considerably.

#### THE BASQUES OF SPAIN

The Basque region of Spain is an area of about 2,739 sq. miles and includes the provinces of Alava, Biscay and Guipuzcoa. Until the twelfth century all those provinces were separate entities. In 1200, Guipuzcoa joined the Castile Crown. It was followed by Alava in 1332 and Biscay in 1370.

Even though the territories became part of the Crown of Spain, they remained what the Spanish described as *tierra apartada*, i.e. 'lands apart'. They thus maintained a considerable degree of autonomy and even had a separate official seal with the symbol of the *Inuracbate*, i.e. "The Three One". They made and kept separate laws and customs which the Kings of Spain pledged to respect. The autonomy of the Basque region in the medieval period is evidenced by the specific and separate mention of the territory in the Treaty of Utrecht signed between England and Spain in 1713.<sup>16</sup>

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14. The history of Catalanism can boast of an impressive range of successive political organizations. *The Centre Catala* was the first organized political group (1882). It was then followed by the *Lliga de Catalunya* in 1887 and the *Unio Catalanista* in 1871. In the early 1900s the leading parties were the *Lliga Regionalista* and the *Centre Nacional Catala*. The year 1919 saw the birth of the most radical political group, the *Estat Catala* (The Catalan State). This party organized an affiliate territorial body called the Black Flag, to pursue a secessionist objective. In 1926 it sponsored an abortive invasion of the Catalan region through the Pyrenees. It was also known to have organized several attempts on the life of King Alfonso XIII (*id.*, 39).

15. Johnson, "Self-Determination: Western European Perspectives", in  
(contd)

The Basque people remained autonomous within the Spanish Crown system until the death of King Ferdinand VII in 1833. In the revolts and crises that followed the death of the king, the Carlist forces were defeated and the region was assimilated into the Spanish nation. The 1837 Spanish Constitution abolished Basque autonomy, but later in 1839, some basic features of the territory's particularism were restored only to be eliminated completely in 1869 by the central government.<sup>17</sup>

The medieval tradition of independence and the brief autonomy in the nineteenth century, provided ample grounds for recurrent Basque separatism. In the confusion of the Spanish Civil War, Basque nationalists established the autonomous government of *Euzkadi* (Basque Country).<sup>18</sup> With the progress of the war, Franco's forces overran the territory, defeated the Basques and abolished any form of Basque autonomy in 1937. Since then Basque separatism has become a thorny issue in the politics of Spain.

*Demands*: Basque separatism was generally secessionist in outlook from its inception. In 1893 the first Basque nationalist organization, the *Centro Vasco*, "called for an independent republican confederation of (all) Basque provinces... , in which unity of race was to be maintained as much as possible by restricting Spanish migration and influences".<sup>19</sup> In modern times, this radical stand is still pursued by Basque extremists under the leadership of the *Euzkadi ta Azkatasuna* (E.T.A.) - Basque Land and Liberty. The E.T.A. is however considered fanatical by a majority of Basques who are content to seek regional autonomy

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15. (contd) Alexander and Friedlander (eds), *Self-Determination: National Regional and Global Dimensions* (1980), 90.

16. The text of the Treaty is reproduced in British Cmd. Papers, 3131, 8.

17. Payne, *op.cit.*, note 4, 33-35.

18. *Id.*, 47-48.

19. *Id.*, 37.

within a unified Spain.<sup>20</sup> Like the Catalans, the Basques pursued their separatist course through the parliamentary processes of Spain. The history of Basque separatism therefore presents one with a succession of regionally-based political parties.<sup>21</sup> After the victory of Franco, such organizations became inoperative in Spain or went underground. Basque extremists established a government in exile based in Paris. Operating from this base, the E.T.A. pursues its secessionist demands through terrorism, claiming responsibility for a series of bombings.

In contemporary Spain, the government of King Juan Carlos has tried to meet some of the autonomist demands of the Basque. In 1977, the King signed a decree that gave the Basque province control over local government and other internal matters which were formerly administered from Madrid.<sup>22</sup> In July 1979, the Spanish government again concluded negotiations with Basque nationalists on self-government for the province. The negotiations were based on a draft statute of autonomy prepared by Basque members of the Spanish parliament. The statute, later approved in a referendum by the Basques, give the province control over taxation, education, the police force and law and order. Despite these concessions the E.T.A. is still actively secessionist.<sup>23</sup> It is however doubtful whether it represents current Basque nationalist sentiments.

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20. *Id.*, 50.

21. The leading Basque political organizations were the *Partido Nacionalista Vasco* (P.N.V.) formed in 1893 and the splinter group, Republican Basque Nationalist Centre. The Marxist oriented E.T.A. is also a splinter group from the P.N.V. (*ibid.*).

22. Note 15.

23. Spain: Negotiations for Basque Autonomy. Aust.Foreign Aff. Rec., Vol. 50 (1979), 2421-422.

## THE CROATIANS

The Croatian region of Yugoslavia comprises the provinces of Dalmatia and Istria. It was a kingdom in the tenth century and lasted until its incorporation into the Austro-Hungarian empire.<sup>24</sup> After ten centuries in the Austro-Hungarian system, the Croats joined other Slavic peoples in 1918 in the territorial settlement of WWI to become part of the new state of the Kingdom of the Serbs, Croats and Slovenes.<sup>25</sup>

### Croatian Relationship with the Rest of Yugoslavia after WWI.

In the post-war political organization of the State, the Serbs dominated. This was to provide acute ethnic antagonism with the Croats demanding autonomy. By 1928, the political system had degenerated and polarized around two main forces: the Centralists, comprising the Serbs, and Federalists headed by the Croatian political parties. In the series of political disturbances which followed, three significant changes occurred:

1. all ethnic based organizations were banned;
2. all federalists' agitations were outlawed; and
3. the State's name was changed to Yugoslavia.

These attempts to create a unified state system and forge new bonds for nationhood met with considerable Croatian opposition

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24. Sereni, "The Status of Croatia Under International Law", *Am.Pol.Sc.Rev.*, Vol. 35 (1940), 144-51.
  25. Other nationalities which were affected by the WWI territorial settlements and are possible separatist groups in this category, include the Germans of the Tyrol, resident in the Italian provinces of Bozen and Trent. They were transferred from Austria to Italy under the Treaty of St. Germain in 1919 (Modeen, *International Protection of National Minorities in Europe* (1969), 86-89). The other groups are the Macedonians in Greece, Bulgaria, Albania and Yugoslavia (Connor, "Self-Determination, 'The New Phase'", *World Politics*, Vol.20 (1976), 43). One could also include the Germans of Rumania who were incorporated into the Rumanian state in its establishment on the ruins of the Austro-Hungarian and Tsarist empires (Castellan, "The Germans of Rumania", *Contemporary History*, Vol. 6 (1971), 52-75.

manifested in a new wave of autonomist protests. The tensions in the State continued till the eve of WWII in 1939. To harmonize divergent interests in order to ensure a concerted national effort for the impending war, the central government made considerable concessions for Croatian autonomy under what came to be called the *Cvetkovic-Macek Agreement*.<sup>26</sup> Encouraged by this development, Croatian nationalism took on a new zeal with the emergence of the radical *Ustashi* group which demanded complete independence.

Croatian separatism was generally opposed by the Serbs who considered it anti-Yugoslavian. Thus in 1941 when the government was dismissed in a military coup<sup>27</sup> for its pro-Axis policies, the *Cvetkovic-Macek Agreement* was annulled. The Croats subsequently became allied with Germany which promised to establish a sovereign state of Croatia with the defeat of Yugoslavia. In April 1941, on the eve of the German invasion, the Croats proclaimed the independent State of Croatia. As part of their war effort they organized the quisling forces and fought on the side of the Axis against the partisan forces of the Serbs and the forces of the Communist Party of Yugoslavia (CPY). This helped to accentuate Croatian-Serb antagonism. With the defeat of the Axis, the State of Croatia fell.<sup>28</sup> It was once again incorporated into the State of Yugoslavia.

*Demands*: At the height of Croatian nationalism, the moderates demanded the establishment of "a socialist sovereign national Croatia, within the framework of a Socialist Yugoslavia".<sup>29</sup> The moderates were essentially autonomists and not secessionist despite their demand for a

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26. *Id.*, 29-30; Tomasevich, "Yugoslavia During the Second World War", in Vucinich (ed.), *Contemporary Yugoslavia* (1968), 60-61.

27. This is usually described as the (military) *Putsch* of March 1941.

28. Note 26.

29. Singleton, "The Roots of Discontent in Yugoslavia", *World Today*, Vol. 28 (1928), 177.

'sovereign national Croatia'. The radicals on the other hand insisted on complete secession from what they regarded as the Serb dominated Yugoslavian State.<sup>30</sup>

After WWII President Tito set himself the task of unifying Yugoslavia. He created six federated republics along the old historic and basically ethnic lines. In the 1950s, the centralized role of the Communist Party made the purported autonomy of the territories meaningless. However in the 1960s, the republics gained a considerable measure of autonomy with the liberalization program in the period which brought changes in the role of the party. In 1971 there was a resurgence of Croatian nationalism leading to massive student demonstrations for greater Croatian autonomy. Tito reacted by removing the leaders of the Croatian Communist Party and strengthening Belgrade's control over the region.<sup>31</sup> He nevertheless introduced constitutional reforms to ensure a measure of autonomy for Croatia. Today, Croatian secessionists are generally active outside Yugoslavia.<sup>32</sup> They operate unofficial diplomatic missions in a variety of countries to propagate their secessionist case.

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30. In the nineteenth century extremist nationalism was organized under the prevesto led by a charismatic Croatian, Anete Starcevic. He denied the existence of the Serbs as a national group and held the view that both theologically and historically, Croatsians had the right to independence (Govorchin, "Pravesto and the Croatian National Issue", East Eyropean Quarterly, Vol.12(1978),57-68)
  31. Andelman, "Yugoslavia: The Delicate Balance", Foreign Affairs, Vol. 58 (1980), 835, particularly at 839-840. Campbell, "Tito: The Achievement and the Legacy", *id.*, 1045, 1050-1051.
  32. Inside Yugoslavia however, separatism is still very active in the Kosovo region with a largely Albanian population. The Kosovan Albanians demand a full federal republican status. In 1981 their demands precipitated a general uprising and a severe response from the Belgrade administration. It is generally believed that in the post-Tito era, Kosovo separatism poses the greatest threat to national stability in Yugoslavia (see Cviic, "Yugoslavia: The Bitter Inheritance", Washington Quarterly, Vol. 4(1981), 18-23; Ramet, "Problems of Albanian Nationalism in Yugoslavia", Orbis, Vol. 25 (1981), 369-388.

## General Remarks

Despite the varied foundations for nationalism, the cases in this category demonstrate some definite discernible trends. They comprise national groups which were once either autonomous or independent in the medieval times. The primary basis for separatist activity is "retrospective nationalism" - a brand of nationalism that derives its sentimental basis from past glories and a consciousness of the former status of autonomy. As a general rule, the groups demand autonomy as opposed to outright secession. The few instances of secessionist demands are usually restricted to pockets of radical minorities within the nationalist movements.

The majority of the groups pursue their demands within the established political processes of their states through ethnic or regionally-based political parties. They generally exploit domestic institutions to redress their demands and hardly resort to the international system for remedies. The cases in this category are treated as issues within the exclusive (domestic) jurisdictions of the parent states. The main solution adopted by parent states is the grant of regional autonomy within the existing body politic. While this may not have satisfied the exiled secessionists, there are indications that autonomy is proving to be a solution to many of the problems of separatism in Europe.<sup>33</sup>

## 2. DEPRIVATIONS OF SECURITY

In this category, we include groups whose claims are founded on genocide or a general social disharmony that threatens to result in genocide. It is important to note that a situation of deprivation

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33. Johnson, *op.cit.*, note 15, 95-96.

could be the cause or the result of the claim. It is the cause if it precedes the claim and the latter is consequently based on it. It becomes the 'result' where it represents the reaction of the state authority to a group's separatist claims.<sup>34</sup>

For the purposes of this category, the genocidal act must necessarily be antecedent to a group's claim. One could thus include the cases of Biafra and Bangladesh. Even though acts of genocide were reported in the Southern Sudan, the facts suggest that genocide was the result and not the cause of the separatist activity.<sup>35</sup> Southern Sudan is therefore excluded from this category.

#### BIAFRA

Nigeria is one of the largest polyethnic societies in Africa. The history of Nigerian colonial nationalism is thus punctuated with several cases of ethnic rivalry and antagonism.<sup>36</sup> Despite such differences, the country emerged on the eve of independence with the various ethnic groups welded into a fragile federation that provided the basis of the Nigerian state. The country was divided into four main autonomous regions with the Ibo ethnic group in the East, the

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34. In many cases, it is possible that the affected claimant group may use the resultant act of genocide as one of the reasons for it claims at a later stage of its separatist struggle. However, this would not change the fact that its initial claim was not based on a situation of deprivation of security. For instance, in recent times, the Eritrean Liberation Forces have accused Ethiopia of a series of genocidal acts. However, their initial claims were not based on this. See page 282, *infra*.
35. In the Sudan, the leading separatist organizations were the Sudan African National Union (SANU) and the radical Anya-Nya freedom fighters. Both were formed before 1963. The civilian massacres in the South never took place till July 1965. Later bombing raids on the South were reprisals undertaken by the central Sudanese government against the Anya-Nya and other separatist elements (Corey, "The Southern Sudan", Contemporary History, Vol. 6 (1971), 108-120, at 119-120. The South Sudan case is discussed at page 251, *infra*.
36. Kirk-Green, "The Peoples of Nigeria, The Cultural Background for the Crisis", African Affairs, Vol. 66, No. 262 (1967), 3-11; see generally also Tamuno, "Separatist Agitations in Nigeria Since 1914", J.M.A.S., Vol. 8 (1970), 563; Amber, "Modernization and Disintegration: Nigeria and the Ibos", J.M.A.S., Vol. 51 (1967), 163-179.



Yoruba in the West and the Fulani and other related tribes in the North while a group of minority tribes occupied the Mid-Western state.<sup>37</sup>

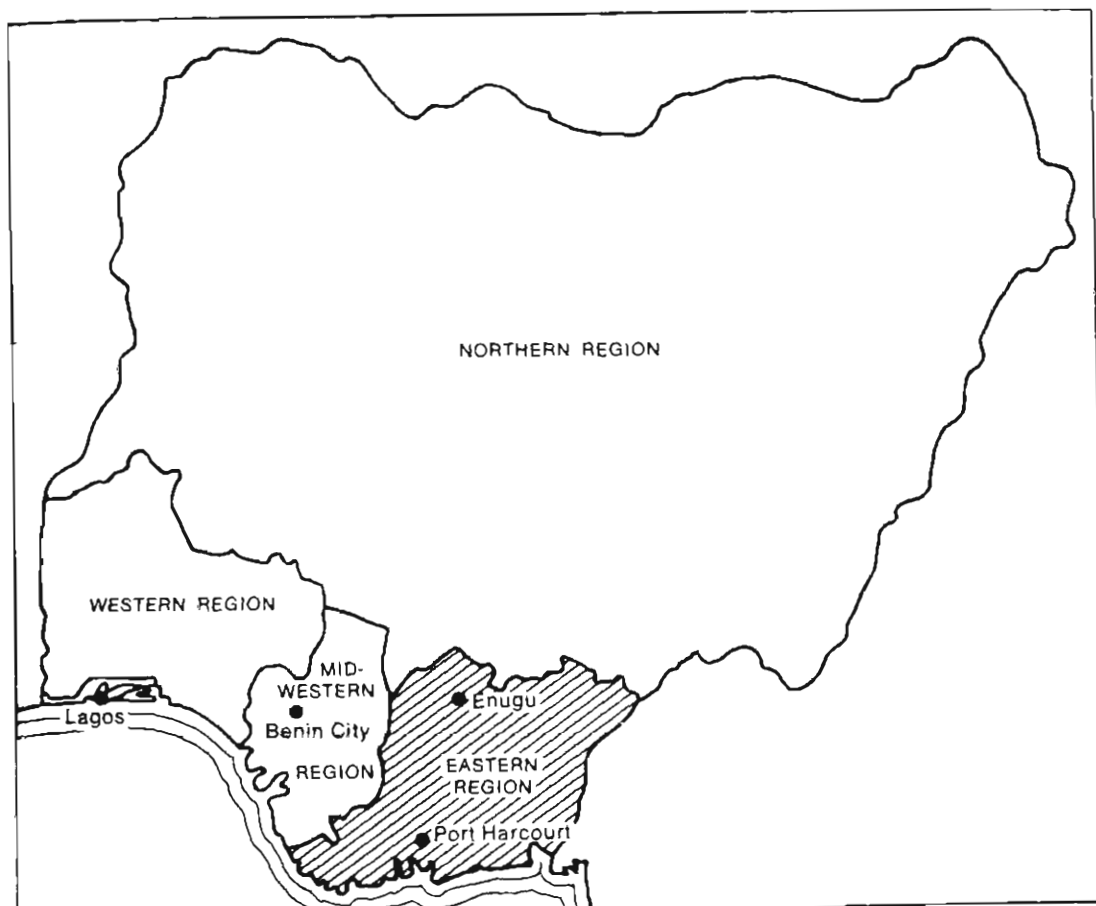


FIGURE V.

REGIONS OF NIGERIA, 1966.

#### East-North Conflicts and the Sources of Disaffection

In January 1966, a military coup overthrew the civilian administration of the country. With the change, the ethnic animosities of the colonial period re-emerged. There were allegations that the coup was engineered by the Ibos and that its victims had been mostly officials of Northern descent.<sup>38</sup>

37. Map in Figure V above.

38. Umozurike, 264; Buchheit, *Secession*, 165.

The dissatisfaction of the Northerners with the state of affairs became evident in a series of disturbances in which over 3,000 Easterners (Ibos) were massacred in the North.<sup>39</sup> In July 1966, there came a further backlash from the Northerners. There was another military coup, this time led by Northern officers. Over 200 Eastern officers were killed.<sup>40</sup>

These events only served to accentuate the ethnic differences between the Northerners and the Ibos of the East. In September 1966, wholesale massacres of Ibos erupted. Ibo tribesmen resident in the North became victims of acts of murder and bashings thus resulting in the death of several thousands and the return of over 20,000 Ibos to their homes in the East.<sup>41</sup>

The general anti-Eastern wave in Nigeria and the resultant conditions of insecurity created grounds for centripetal sentiments among the Easterners and were later to provide the basis for secessionist activity.

In the months after the massacres, fruitless attempts were made to resolve the differences between the Ibos and the other ethnic groups. In May 1967, a joint meeting of the Consultative Assembly of the Chiefs and Elders of Eastern Nigeria authorized the military governor, Colonel Ojukwu to effect a secession of the region from the rest of Nigeria. The events that followed the proclamation of secession became the tragic story of Biafra.<sup>42</sup>

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39. The exact figure of Easterners killed in the North differs according to different authors. Umozurike puts the figure at 3,000 as at May 1966. However, other estimates put the figure at 10,000: 30,000 and even at 40,000. See Panther-Brick, "The Right to Self-Determination: Its application to Nigeria", *Int. Affairs*, Vol. 44 (1968), 262, note 5; I.L.M., Vol. 6 (1967), 668; Post, "Is there a Case for Biafra?" *Int. Affairs*, Vol. 44 (1968), 32.

40. *Umozurike*, 264.

41. *Ibid.*

42. The Biafran crisis is treated extensively in the following works: Cronje, *The World and Nigeria: The Diplomatic History of the Biafran War 1967-1970* (1972); Hatch, *Nigeria: A History* (1970).

Demands: The Biafran demands were implicit in the very act of secession. It is however, interesting to note that before the breakaway, Biafran separatism had been manifested at the Aburi negotiation in a demand for a confederacy of Nigerian states. It was only when the agreement reached broke down that Colonel Ojukwu was authorized to declare the state of Biafra.<sup>43</sup>

The Biafran case attracted considerable international intervention. From the beginning, Ghana and the OAU intervened in an effort to resolve the crises through mediation. Both attempts failed.<sup>44</sup> Biafra undertook extensive international propaganda to win support for its claims. In all, its efforts were rewarded with its recognition by five states<sup>45</sup> and an overflow of relief and emergency services. The rebel state also received considerable external military support to sustain its claim.

For its part, the federal government also adopted a military solution with the failure of the mediation attempts. After three years of a bloody and tragic civil war, the Biafran forces were defeated and the territory reunited with the rest of Nigeria.

#### BANGLADESH

On the eve of independence, the Indian subcontinent was divided roughly along "Hindu-Muslim" lines to form the states of Pakistan and India. The partition left the new state of Pakistan divided curiously into two parts, East and West, separated by several hundred miles of Indian

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43. Colonel Ojukwu and Lieutenant-Colonel Gowon met for direct negotiations in Aburi, Ghana, from January 4-5. The parties agreed on a loose form of federation that would ensure more decentralization in favour of the regions. Gowon later interpreted the Aburi agreement as allowing for increased centralized authority and thus rejected Ojukwu's insistence on regionalism. See the comments of Nwarko and Ifejika in *The Making of a Nation: Biafra* (1969), 216-220; *Umozurike*, 264.
  44. A report on the mediation efforts by Ghana and the OAU is reproduced in NYJILP. Vol. 2 (1969), 420-426.
  45. The five states were the Ivory Coast, Gabon, Tanzania and Haiti and Zambia.

territory.\* The west comprised the area north west of the subcontinent and was occupied by the Punjabis, Sindhis, Baluchis and Pathans. The East became the area north-east of the subcontinent where there was a concentration of Islamic Bengalis.<sup>46</sup>

In the years after independence, dissatisfaction grew among the people of the East as a result of disparities in economic development and the unequal distribution of the national cake. These were accentuated by corruption and political decay in the government which was based in the West.<sup>47</sup>

To save the general situation in the country, a military coup led by General Ayub Khan dismissed the civilian government in 1958. The Ayub Khan administration however failed to bridge the widening economic differences between the East and the West. Its period of office was marked with a series of failures and thus necessitated a change.<sup>48</sup> In 1969 Ayub Khan resigned and was replaced by Yahya Kahn who pledged an early return to civilian rule.<sup>49</sup>

In October 1970, general elections were organized for the formation of a Constituent Assembly. There were 300 seats, 162 for the populous East and 138 for the West. Out of these, the Awami League, under the leadership of Sheikh Mujibur won 160 in the East on the basis

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46. On the history of the partition of the subcontinent, see generally Ambedker, *Pakistan or the Partition of India* (1946); Spear, *The Oxford History of India* (1958), Chapter 8.

47. Chowdhury, *The Genesis of Bangladesh* (1972), 9-19. Choudhury, *The Last Days of United Pakistan* (1974), 8-9. Nanda, "Self-Determination outside the Colonial Context: The Birth of Bangladesh in Retrospect", *Houston Journ.Int'l.Law*, (1978), 71-93 at 72. The relationship between the East and West was described as one of "internal colonialism" (Nayar, "Self-Determination: The Bangladesh Experience", *Revue de Droits de L'homme*, Vol.7 (1974), 231-271, at 232-233).

48. Choudhury gives a personal account of the failures of Ayub and his eventual fall from political grace (*id.*, 13-45, particularly at 15, 20-21, 37-40).

49. *Id.*, Broadcast of Yahya Khan, March 26th, 1969, quoted in *id.*, 49.

\* See Figure IV, page 152, *supra*.

of the "Six Points" program presented for the election campaign.<sup>50</sup>

The significance in the six points lay in the fact that the program sought to give the East an unusually substantial degree of autonomy within a federation of Pakistan. It represented a bold attempt by the Awami League to remove the East from the domination of the West and to terminate the existing economic disparities between the two regions. The provisions of the six points program were thus very far-reaching and only stopped short of outright secession.<sup>51</sup> It naturally proved to be unacceptable to the government elite of the West.

In the period of negotiations and disagreements that followed, the date for the inaugural session of the National Assembly was postponed indefinitely. This sparked off a series of protests and disturbances in the East. Meanwhile the central government instituted a large military build-up in the region. Negotiations between the parties started again on the 15th March 1971.<sup>52</sup> On March 25th the parties suddenly terminated the talks due to a failure to reach any agreement. On that night, the forces of the West Pakistan Army commenced a

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50. The text of the "Six Points" program is reproduced in NYUJILP, Vol. 4 (1971), 524. In summary, the program called for:

- (1) a federal constitution for Pakistan; and a parliament elected on universal adult suffrage.
- (2) Federal responsibility only for defence and foreign affairs subject to provisions '3'.
- (3) Two separate and convertible currencies for the East and the West or the establishment of separate reserve banks to prevent the transfer of reserves and capital from the East to the West.
- (4) Fiscal policy for the East to be vested in East Pakistan.
- (5) Separate foreign exchange earnings for the East and the West; constitutional powers to enable the East to establish trade and aid links with foreign states.
- (6) East Pakistan to be allowed a separate militia or paramilitary force.

51. Choudhury observes that "under Mujibur's six points program the centre was made a paper one; it would have no control over the country's fiscal, monetary and budgetary policies or their execution. In external affairs it made the work of a foreign ministry meaningless..Mujibur's six points plan was nothing by a veiled scheme of secession..." (*op.cit.*, note 47, 136).

52. *Id.*, 161.

campaign to subdue the East.<sup>53</sup>

In the weeks that followed, there was a general agreement that the West Pakistan forces committed atrocities of incredible and unexpected magnitude. By the middle of April 1971, all the principal towns in the East were under the control of the Western army and any East Pakistani of substance had been executed or driven into exile.<sup>54</sup> On the 10th April 1971, a government of Bangladesh (in exile) was proclaimed "in...fulfilment of the legitimate right of self-determination of the people of Bangladesh".<sup>55</sup>

Demands: Like the Biafrans, the demands of the Bengalis were implicit in the very act of secession. It is also interesting to note that in this case too, there was a demand initially, for a loose federation of some sort, capable of guaranteeing a substantial degree of autonomy.

Bangladesh adopted secession as a last resort. With the decisive support of India,<sup>56</sup> Bangladesh successfully became established as a

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53. Nayar, *op.cit.*, note 47, 232; Nanda, *op.cit.*, note 48, 74, *id.*, 180.

54. It was estimated that about three million people were killed (Nanda, 181). This was an estimate by Mujibur and could have been exaggerated. Nevertheless the brutality of the West Pakistan forces and the extensive human destruction have never been disputed. The International Commission of Jurists noted that the main features of the campaign were the indiscriminate killing of civilians, including women and children and the poorest and the weakest members of the community; the attempts to exterminate or drive out of the country a large part of the Hindu population; the arrest, torture and killing of Awami League activists, students, professional and businessmen and other potential leaders among the Bengalis (*Events in East Pakistan*, publication of the Secretariat of the International Commission of Jurists (1972), 26-27).

55. NYUJILP, Vol. 4 (1971), 557.

56. Buchheit rationalizes Indian aid to East Pakistan by observing that: "India clearly had a stake in the conflict, if for no other reason (and there were other reasons) than the vast numbers of refugees pouring across its borders" (*Secession*, 207). India's decisive role in the conflict is emphasized by Brown when he argues: "The victory of the forces for independence was achieved through (the) aid India rendered...This turned out to be of two kinds: one was the arming of the guerrilla force known as the Mukti-Bahini,...the other was the invasion of East Pakistan by India." (*The United States and India, Pakistan and Bangladesh* (1972), 218.) In view of the Indo-Pakistan perennially sour relations which had resulted in recurrent hostilities, India had

state. All actions by Pakistan to reunite the East with the rest of the country were terminated effectively with the defeat of Pakistan by India in the 1971 Indo-Pakistan war which had resulted from India's intervention in support of the secession.

### General Remarks

The fact that there are only two cases in this category would support the view that separatist claims are rarely based on deprivation of security. Outright secession is the most favoured solution sought by the claimants. In both cases, the quest for secession was preceded by a demand for some form of confederation. It is thus logical to suggest that in this category secession only becomes an attractive alternative where a desirable level of autonomy for the claimant group is rejected. Since there are only two isolated cases in this category, one lacks the proper empirical bases for any definite conclusions. The foregoing general remarks are therefore necessarily tentative.

### 3. DEPRIVATION OR DESTRUCTION OF FUNDAMENTAL ETHNIC OR CULTURAL HERITAGE

Cultural heritage involves all aspects of a group's life-style and traditions inherited or transmitted through the society. It includes forms of linguistic expressions, religious beliefs and other social symbols and values. The destruction of a given cultural

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56. (contd) obvious strategic interests in ensuring the dismemberment of Pakistan. See the comment of Choudhury, *op.cit.*, note 47, 210-214. See also Kumar, "The Evolution of India's Policy Towards Bangladesh in 1971", *Asian Survey*, Vol. 25 (1975), 488, 498.

heritage is usually the result of a clash of two or more cultures. In such a situation, the culture of a dominating group assumes a superior status and becomes the imposed or the accepted symbol and standard of general group behaviour. It consequently provides the basis for the eventual destruction of the other (i.e. inferior) culture(s). Alien domination for instance may provide a *prima facie* basis for the elimination of an indigenous culture.

The destruction of an ethnic heritage could also occur in plural states where an ethnic group or groups entrenched in political authority dominate the groups. In contemporary times, the elimination of indigenous culture in such communities in the name of modernization or some other political reasons is quite common and has been described as "cultural genocide" or ethnocide.<sup>57</sup>

Given the fundamental relationship between the issue of domination and self-determination, a substantial number of separatist movements usually cite cultural deprivation as one of their grievances.<sup>58</sup> However, cases of separatism founded principally on cultural genocide as such are rare. The leading case is that of Tibet.<sup>59</sup>

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57. The issue of cultural genocide is discussed in detail at page 316, *infra*.

58. In the case of South Sudan, the separatists argued: "the present Northern Sudanese attitude and the policies applied to the South (lead) to the conclusion that their aim is to destroy the African negroid personality and identity in the Sudan and replace him with an arabicized South" (Oduho and Deng, *The Problem of the Southern Sudan* (1963), 38). The Eritrean separatist movement also complains that the Ethiopian government has shown complete disregard for Eritrean culture to the point of cultural genocide through the abolition of local Eritrean languages (Greenfield, *Eritrea's Quest for Freedom*. Mimeo. (1978), 2. The issue of cultural deprivation also features in the claims of most of the European nationalities: such as the Armenians, the Germans of the Italian Tyrol, and then the Kurds in Iraq. See also the case of Quebec discussed at page 259, *infra*.

59. The issue of Tibet has also been considered as genocide (International Commission of Jurists, *The Question of Tibet and the Rule of Law* (1959), 68-99). It is however submitted that the evidence from the case is consistent with the view that the Chinese authorities have not shown any intentions of destroying the people of



## TIBET

Tibet is known to have existed as an independent entity up to the end of the seventeenth century when it came under Chinese influence as a result of its reliance on the latter's military aid.<sup>60</sup> By the first half of the eighteenth century Tibet is reported to have become a vassal state of China under the Manchu emperors.<sup>61</sup> Following the revolution of 1911 in China, the Manchu Emperors were banished from Peking, Chinese suzerainty over Tibet came to an end.<sup>62</sup> Tibet declared her independence in 1912.<sup>63</sup> However, it did not avail itself of her external sovereign rights which subsequently became "a matter of coordinated British and Chinese policy".<sup>64</sup> This created grounds for the emergence of Chinese influence in the territory and the eventual declaration in 1931 that Tibet was a province of China.<sup>65</sup>

As a result of China's preoccupation with WWII, Tibet was left alone in the immediate pre-war years. It thus emerged as a full independent state and was reported to have made tentative attempts to join the United Nations after the war.<sup>66</sup>

After the 1949 revolution in China, Chinese forces invaded Tibet

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59. (contd) Tibet as such, but there is every indication that they have attempted a deliberate and systematic destruction of Tibetan culture.

60. Alexandrowicz-Alexander, "The Legal Position of Tibet", A.J.I.L., Vol. 48 (1954), 265-275 at 267. For a comprehensive discussion of the history of the region see generally Richardson, *A Short History of Tibet* (1962).

61. Alexandrowicz, *ibid.*

62. *Id.*, 270. Richardson, *op.cit.*, note 60, 39.

63. McCabe, "Tibet's Declaration of Independence", A.J.I.L., Vol. 60, (1966) 369-371 at 370; Appadorai *et al.*, "Bases of India's Title on the North-East Frontier", International Studies, Vol. 1 (1960), 362-363; Sharma, "The India -China Border Dispute", A.J.I.L., Vol. 59, (1965), 16-47. For a different opinion see Tieh-Tseng Li, "The Legal Position of Tibet", A.J.I.L., Vol. 50 (1956), 394 at 397; Rubin, "A Matter of Fact", A.J.I.L., Vol. 59 (1965), 586.

64. Alexandrowicz, *op.cit.*, note 60, 271.

65. *Id.*, 273.

66. *Ibid.*

in 1950 ostensibly "to free the three million Tibetans from imperialist oppression and to consolidate the national defence of China's western province."<sup>67</sup> Following Tibet's appeals to the United Nations for help, El Salvador moved to put the Tibetan issue on the General Assembly's agenda.<sup>68</sup> However, India suggested that the consideration of the matter should be postponed indefinitely pending a negotiated settlement which could safeguard Tibet's internal self-government while maintaining its association with China.<sup>69</sup> Tibet was subsequently encouraged to enter into talks with the Peoples' Republic. The result of the negotiations came to be called the "Seventeen Point Agreement".<sup>70</sup>

The principal features of the agreement were as follows:

- Right of entry of the Chinese army into Tibet for defence purposes
- China would not alter the existing political system or the status of the Dalai Lama as temporal and spiritual head of Tibet
- Respect for Tibet's religious practices, beliefs and customs and protection of all lamas and monasteries
- The development of a Chinese language and school system; no compulsory reforms were however to be carried out.
- China was to be responsible for external affairs, but Tibet was free to have commercial and trading relations with other states
- The establishment of a military and administrative committee which was to include "patriotic" local personnel.

In June 1959, the Dalai Lama accused China of violating its obligations under the agreement.<sup>71</sup> He consequently repudiated it and

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67. International Commission of Jurists, *op.cit.*, note 59, 94.

68. U.N.Doc A/1543, 24th November 1950.

69. *Ibid.*

70. The full text is reproduced in the Report of the International Commission of Jurists, *op.cit.*, note 59, 139-142. The accord was originally called "Agreement on Measures for the Peaceful Liberation of Tibet".

71. *Id.*, 202.

thus opened the path for Tibetan separatism. He argued that China had breached its obligations by (1) undermining his authority and the autonomy of Tibet, (2) not allowing freedom of religious belief and then the destruction of monasteries, (3) the introduction of compulsory reforms in Tibet. He concluded that the breaches represented "the ultimate Chinese aim...to attempt extermination of the religion and culture and even the absorption of the Tibetan race".<sup>72</sup>

In July 1959, an investigation team of the International Commission of Jurists attested to the violations of the agreement by China. It also made the following observations:

- (1) The Chinese had deliberately set out to assimilate Tibetans into the Chinese Communist way of life; and the violation of Tibet's autonomy, by undermining the Dalai Lama's personal authority, represented in the circumstances a logical step towards the destruction of the Tibetan way of life.<sup>73</sup>
- (2) In a theocratic society, a campaign to stamp out religion aimed to destroy not only the freedom of worship but the whole fabric of that society. If the Chinese were to destroy the Tibetan way of life completely, the destruction of religious belief and religious institutions was a sheer necessity.<sup>74</sup>
- (3) The evidence on the development of education showed clearly the familiar Communist technique of indoctrination and assimilation: (and) "the Tibetan way of life was being deliberately replaced... by some of these methods in particular by propaganda".<sup>75</sup>

The Dalai Lama left Tibet in March 1959 on the eve of a series of protests against Chinese rule. He has since established a Tibetan government in exile in India.

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72. *Id.*, 12.

73. *Id.*, 21.

74. *Id.*, 35.

75. *Id.*, 49.

*Demands:* A fundamental problem between Tibet and China relates to the interpretation of the status of autonomy for Tibet. The Chinese regard it as a regional autonomy *within the framework of the Chinese State* for the purposes of culture, education and religion. The Tibetans on the other hand, take the view that at most, China is only responsible for external affairs and defence. In any other matters, the Tibetan Government is supreme; consequently China cannot legislate on issues relating to the internal administration of Tibet.<sup>76</sup> As a way out of these contradictory interpretations, Tibet demands a return to its position prior to 1950 when the Dalai Lama enjoyed sovereign rights.<sup>77</sup> The objective of Tibetan separatism is thus sovereign statehood.

The Tibetan problem has not been resolved. The Dalai Lama remains in exile. However, unlike other exiled separatist groups, the Dalai Lama with his Indian-based cabinet is still recognized as the temporal and spiritual leader of Tibetans both inside and outside Tibet. Even though the Tibetan exiled government maintains a national defence army,<sup>78</sup> it is primarily committed to a peaceful resolution of current problems. Pockets of armed Tibetan 'rebels' resisted the Chinese in 1959, however China's control over the territory has consolidated over time and the incorporation of Tibet is now a *fait accompli* as far as Peking is concerned. After the departure of the Dalai Lama from Tibet, the Chinese installed the Panchen Lama who, as a puppet of Peking, is now the officially recognized spiritual head of Tibet.

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76. *Id.*, 97.

77. *Id.*, 203.

78. In July 1959 it was reported that about 50,000 Tibetans had signed up in the volunteer force to wage a guerrilla war against the Chinese (*id.*, 10).

### General Remarks

Since Tibet is the only case in this category it provides an inadequate basis for any generalizations. One can nevertheless make broad remarks in specific reference to the Tibetan issue to indicate possible theoretical relationships between it and other cases.

The case has attracted very little international reaction despite the unequivocal condemnation of China by the International Commission of Jurists. India's treatment of the entire issue has been very cautious. It granted political asylum to the Dalai Lama on condition that he pursued only religious activities and did not indulge in politics.<sup>79</sup> After the repudiation of the Seventeen Point Agreement, India quickly issued a statement that it did not recognize any separate Government of Tibet and that there was no question of a Tibetan Government under the Dalai Lama operating in India.<sup>80</sup> This action was in sharp contrast to India's apparent humanitarian stand on the issue of Bangladesh.

India's attitude was apparently dictated by two factors: the sheer political and strategic necessity to avoid doing anything that might antagonise the populous and powerful Peoples' Republic of China, and particularly the need to abide by the terms of an accord on co-existence executed between India and China in 1954 in which both parties reached a compromise on Tibet. Even though the exact details were not published, a communique issued after the signing of the agreement noted that the parties had "discussed fully questions existing in the relations between China and India on (the) Tibet region of China".<sup>82</sup>

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79. *Ibid.*

80. *Ibid.*

81. Sharma, *op.cit.*, note 63, 18.

82. *Id.*, 25.

#### 4. RACIAL DISCRIMINATION

Racial discrimination and its corresponding inequalities exist in most, if not all multi-racial communities. However, the degree of discrimination and the concomitant social acrimony it generates, vary depending on the peculiar historical, political and social circumstances of each community. Consequently, while the phenomenon is common to multi-racial states, few racial groups have embarked on separatist activities founded principally on discrimination.

The main cases in this category are the following:

##### THE BLACK AMERICANS

Black Americans constitute about 11% of the population of the United States. They are the descendants of African slaves who were brought to the country from the beginning of the seventeenth century onwards. Slavery in the United States was abolished in the nineteenth century. Nevertheless, the position of the slave in the two previous centuries led to the consolidation of stereotype notions and the creation of traditional prejudices which provided (and still provide) a social basis for discrimination against the Black American.

In the 1857 case of *Dred Scott v. Sandford*<sup>83</sup> the American Supreme Court held that Black Americans were excluded from the meaning of the term 'citizen'. They were rather considered as 'property'. Post-abolition attempts were made by the American Congress to grant equal rights of citizenship to Black Americans through the Civil Rights Act of 1875. This suffered a great setback when the Supreme Court declared it unconstitutional in 1883.<sup>84</sup> As one author notes, "it required a Civil War; the approval of the Thirteenth and Fourteenth Amendments and the passage of multiple congressional Civil Rights Acts;

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83. U.S. (19 How.) (1857), 383.

84. Civil Rights Cases, 109 U.S., 3, quoted in *Umozurike*, 253.

100 years of court litigation; and an active equal rights movement to reverse and erase the ominous legacy of the *Dred Scott* decision"<sup>85</sup> and other related cases.

The late 1950s and the early 1960s saw increased Black activism in the United States.<sup>86</sup> This produced qualitative changes in the rights of Black Americans evidenced by their participation in the political and administrative processes. Despite the improvements of the last three decades, racial discrimination is very much a part of American social, political and economic life. It consequently provides the basis for modern Black American separatist activity.

*Demands*: Early Black American activities demanded the creation of a separate Black State. In the 1930s, a group of middle class Black Americans formed the National Movement for the Establishment of a 49th State for Negroes.<sup>87</sup> In the 1960s, Elijah Muhammad, an influential Black activist also emphasized the demand for the separate state: "We want our people...to be allowed to establish a state or territory of their own - either on this continent or elsewhere".<sup>88</sup> The idea of a separate state appears to have won considerable support among Black Americans by the late 1960s. In 1967 for instance, it was decided in the Resolution of the Newark Conference on Black Power, to "initiate a national dialogue on the desirability of partitioning the U.S. into separate and independent nations, one to be a homeland for whites and the other to be a homeland for Black Americans".<sup>89</sup>

Even though the idea of a separate state still has a few ardent

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85. Davila-Colon, "Equal Citizenship, Self-Determination and the U.S. Statehood Process: A Constitutional and Historical Analysis", Case W. Res.Journ.Int'l.l., Vol.13 (1981), 315-374 at 356.

86. For a detailed discussion of the history of Black activism in the United States see Logan and Winston, *The Negro in the United States* (1971), Vol. I and Vol. II, particularly Chaps. 1-5 of Vol. II.

87. *Id.*, Vol. II, 74.

88. *Id.*, 75-76.

supporters, the objective and practical realities of the American situation render it too idealistic and in any case unacceptable to the American community. It is also doubtful whether it represents current Black nationalist ideals.

The most contemporary expression of Black American separatist ideals was the statement by Malcolm X in his famous 'Ballot or the Bullet' speech. He said "the political philosophy of black nationalism only means that the black man should control the politics and the politicians in his own community".<sup>90</sup> Later, another activist, Stokely Carmichael, elaborated on this in his definition of Black Power. He saw black activism as "the control of political power where they enjoyed the majority and proper representation and sharing of control where they were a minority".<sup>91</sup> The positions of Carmichael and Malcolm X support the view that as a diffused group, Black Americans do not seek secession for obvious practical reasons. Umozurike suggests that:

What is reasonably demanded and possible of attainment, is that the Afro-Americans should play a commensurate role in the political, economic, cultural and social life of the United States.<sup>92</sup>

Black Americans have pursued solutions to their demands principally within the municipal legal and political systems of the United States. In the 1960s, there were sharp differences among leading activists as to goals and strategies of Black separatism.<sup>93</sup> Extreme groups such as the Black Panther Party and radical revolutionaries like Stockely Carmichael and Rap Brown favoured violence.<sup>94</sup> Dr. Martin

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89. Chambers (ed.), *Chronicles of Negro Protests*, 281-282. In 1970, the Black Panther Party also made similar secessionist demands. See Umozurike, 256.

90. Logan and Winston, *op.cit.*, note 86, Vol. II, 75.

91. *Id.*, 77.

92. Umozurike, 256.

93. Logan and Winston, *op.cit.*, note 86, 77.

94. Rap Brown for instance advocated for a "guerrilla warfare on the honkie white man" (*id.*, 79).



Luther King, Jr. and his civil rights movement advocated a peaceful approach.<sup>95</sup> Even though there were outbursts of riots and violence in the 1960s and still a few more in modern times, peaceful but assertive methods have become more popular and acceptable to the majority of Black Americans. The solution of the problem from the side of Black Americans has thus been pursued generally through court processes<sup>96</sup> and with the aid of a wide range of civil rights organizations.

On its part, the American government has employed legislation and constitutional amendments in an attempt to solve the race problems. Thus discrimination and segregation are illegal in modern-day America. Attempts to ensure equality for Black Americans is evidenced by the incorporation of Blacks in the administration of the State and through the provision of educational and social privileges. However, these efforts have not in themselves eliminated the social problem of discrimination in the United States.

#### THE ABORIGINES OF AUSTRALIA

The Aborigines, about 120,000 to 150,000 in all, are found all over Australia.<sup>97</sup> They are however heavily concentrated in the Northern and Central parts of the country. Usually dark in complexion, the Aborigines are the descendants of the indigenous nomadic residents

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95. On Luther King's philosophy of Black activism see generally, Hanes, *The Political Philosophy of Martin Luther King, Jr.* (1971); Lenwood, *I Have a Dream: Life and Times of Martin Luther King, Jr.* (1973).

96. See for instance, such outstanding cases as:  
*Morgan v. Virginia*, 328 U.S. (1946), 373  
*Shelley v. Kramer*, 334 U.S. (1948), 1  
*Sipuel v. Boards of Regents*, 332 U.S. (1948), 631  
*McLaurin v. Oklahoma State Regents*, 339 U.S. (1950)  
*Brown v. Board of Education*, 347 U.S. (1954), 483.

97. Coombs, *Australia's Policy Towards Aborigines*, 1967-77, M.R.G. Report No. 35 (1978), 6. The figure may not be accurate. Jones suggests that the figure could be double and that "300,000 is now generally regarded as the best estimate," *Australia's Aboriginal Population* (1970), 2.

of the Australian continent,<sup>98</sup> and the object of a unique racial problem in contemporary Australia.

The roots of the problem go back to 1770 when Captain Cook discovered Australia and proclaimed it a territory of the British Crown. In the subsequent years, the country came to be used as a penal settlement with the first shipment of convicts arriving in 1788.<sup>99</sup> Later, the vastness of the land with its promising opportunities for agricultural activity attracted speculating and adventurous Englishmen, who, over time, moved in and established colonial settlements.

In time, there developed occasional clashes between the white settlers and the Aborigines. Despite imperial instructions to the governors and the Governor-General, to treat Aborigines with "amity and conciliation",<sup>100</sup> the aborigine-settler relationship deteriorated rapidly in the first few decades of European settlement. It is said that groups of settlers enthusiastically committed themselves to the total extermination of the Aborigines.<sup>101</sup> The gravity of the situation was noted in a government report:

We can sum up by saying that for the first seventy-five years of Australian (settler) history the Aborigines decreased rapidly towards extinction in the regions which were most desirable for settlement and in the second seventy-five years they decreased also and just as certainly, but at a much slower rate, in the sparsely settled regions of the interior and north. Indeed, it was the accepted view, even thirty years ago, that the Aborigines would completely die out except for part Aborigines.<sup>102</sup>

Thirty years ago, there appeared to have been grounds for the

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- 98. Bleakley, *The Aborigines of Australia* (1961), 1-15.
  - 99. Cohen, "Makarata, A Treaty within Australia", *Current Affairs Bulletin* (Feb. 1981), 4.
  - 100. The Department of Territories, *The Australian Aborigines* (1967), 31.
  - 101. Bennett, *Human Rights for Australian Aborigines* (1957), 3.
  - 102. The Department of Territories, *op.cit.*, note 100, 30-31.

grim pessimism noted in the report. For one thing, even though the Aborigines were the indigenous inhabitants, the Australian settlers took the general view that before the discovery of the country by Captain Cook, Australia was *terra nullius*. The Aborigines could consequently not claim any territorial title on the basis of original occupation.<sup>103</sup> Apart from the issue of land rights, the Aborigines were not included in the calculation of any official population statistics by virtue of Section 127 of the Australian Constitution.<sup>104</sup> They were thus not considered Australian citizens and had no voting rights until 1967. Deprived of land rights, and without the basic social infrastructure for integration into the Western society of the period, the Aborigines lived in their traditional style, in the midst of a prosperous Western society.

In the late 1920s, grave concern about the possible extinction of the Aborigines as a race led to the adoption of an official policy of "Protection" for them.<sup>105</sup> However, by the early 1930s it became obvious that "Protection" had failed. In 1931, the Australian Association for the Protection of Native Races advocated a new deal and the implementation of a "Positive Policy for Aborigines". It sought to bring their plight to government and public attention.<sup>106</sup> As a result of the Association's efforts, there was a proliferation of humanitarian

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103. *Coe v. The Commonwealth of Australia* (1979), A.L.J.R., Vol. 53, 403. See however the judgment of (Justice Murphy) for the view that before the arrival of the white settlers the Aborigines had occupied Australia for several thousand years and that though the Aborigines were nomadic, the groups were confined to definite areas over which they moved from time to time. Basing himself on the opinion of Judge Gros in the *Western Sahara Case*, Justice Murphy argued that "independent tribes travelling over a territory or stopping in certain places may exercise a *de facto* authority which prevents the territory being *terra nullius*" (*id.*, 412).

104. Jones, *op.cit.*, note 97, 5.

105. Department of Territories, *op.cit.*, note 100, 31-33.

106. *Id.*, 36.

and missionary organizations by 1935 all dedicated to the welfare of Aborigines.<sup>107</sup>

Under pressure from these groups, the Australian Government commissioned a study into the situation of Aborigines in 1935. The commission was later to recommend the establishment of Aboriginal reserves, special Aboriginal courts in such areas and separate departments for Aboriginal affairs.<sup>108</sup>

### Assimilation Policies

In 1936, the Conference of Commonwealth and State Ministers in Australia, agreed to adopt co-ordinated policies on Aborigines through annual conventions of their relevant departments.<sup>109</sup> One of such meetings took place in 1937. The next one could not be convened until 1948. The significance of the conventions lay in the fact that the first meeting adopted a policy of Assimilation for all Australian Aborigines. The policy as later modified in 1965 was defined as follows:

The policy of Assimilation seeks that all persons of Aboriginal descent will choose to attain a similar manner and standard of living to that of other Australians and live as members of a single Australian community - enjoying the same rights and privileges, accepting the same responsibilities and influenced by the same hopes and loyalties as other Australians. Any special measures taken are regarded as temporary measures, intended to meet their needs for special care and assistance and to make the transition from one stage to another in such a way as will be favourable to their social, economic and political advancement. <sup>110</sup>

The policy marked the beginning of increased welfare programs for Aboriginal communities in Australia. It also heightened public awareness of their problems.

In 1967, over 90% of the Australian electorate voted in a

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107. The organizations included the National Missionary Council of Australia; The Australian Aborigines' League (Victoria); The Aborigines Amelioration Society (Perth); and the Aborigines Friends Association (Adelaide) (*id.*, 37).

108. *Id.*, 38

109, *Ibid.*

110. Quoted *id.*, 44.

referendum to empower the Federal Parliament to legislate in respect of Aborigines throughout Australia. The results of the referendum had significant implications for Australian Aborigines. Section 127 of the Australian Constitution on the exclusion of Aborigines from population statistics was repealed.<sup>111</sup> Aboriginal issues became a subject of concurrent jurisdiction and encouraged federal intervention and commitment on matters relating to Aboriginal welfare. The Federal Government consequently created a Council and Office of Aboriginal Affairs to establish communications with Aborigines and to advise government on policies and administrative machinery for dealing with Aboriginal problems.<sup>112</sup>

#### The End of Assimilation

After 1965, the official policy of "Assimilation" came under public attack. It was established by the Council for Aboriginal Affairs that Aborigines did not want to be assimilated and that "one of the few things Aborigines held in common was a determination to maintain a distinctive racial and social existence within the Australian community".<sup>113</sup> In 1972, the new Labor government of Australia committed itself to an "independent and distinctively Aboriginal development". It called this the right to "self-determination" for Aborigines in Australia.<sup>114</sup> The conservative Liberal and Country Party coalition which came into government in 1975 also abandoned the policy of assimilation. It recognized "the fundamental right of Aborigines to retain their racial identity and their traditional lifestyle where they wished to do so". It called this policy "Self-Management".<sup>115</sup>

Australian government policies since 1972 provide a basis for the

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111. Jones, *op.cit.*, note 97, 5.

112. Coombs, *op.cit.*, note 97, 6.

113. *Ibid.*

114. *Ibid.*

115. *Id.*, 7.

integration of urban Aborigines into the mainstream of Australian life while preserving the cultural identity of tribal Aborigines. Successive governments have tried to meet the needs of the Aborigines through comprehensive community welfare programs. The decline in the population of Aborigines has been arrested while Aboriginal health issues are receiving increased attention. Despite these efforts, the Aboriginal problem is still a major issue in Australia. In several states, the traditional Aboriginal title to land is not recognized. Illiteracy among Aborigines is unusually high. They are mostly unemployed and given to alcoholism and crime. The Aborigine is still the object of intense racial discrimination in the Australian community.

*Demands:* One of the main demands of Aboriginal activists is noted by Dr. H.C. Coombs:

From the Aboriginal point of view the major issue which has emerged since the Referendum and which has become the essence of self-determination and the test by which Government attitudes, policies and programs (are) judged, is the issue of Aboriginal rights to land.<sup>116</sup>

Apart from the economic and political significance of land to the Aborigines, it is also symbolic of the totemic and spiritual ethos of the people. To them, the land constitutes a definite link with their ancestry and represents the object of a continuing trust for future generations. Aborigines further demand respect for their cultural identity through acknowledgment of sacred land rights and other institutions of traditional value. Finally, they seek increased government expenditure on welfare programs particularly for tribal communities and equal opportunities for all Aborigines in general.

Active Aboriginal separatism is fairly recent in Australia. Since its inception in the mid-1960s it has been confined principally to the Australian domestic scene and has usually taken the form of non-violent protest, marches and occasional press releases and representations to

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116. *Id.*, 8.

government authorities. A few non-government organizations have intervened in the issue but such groups have made very little impact.<sup>117</sup>

In recent times there have been attempts by the federal government to examine the issue of Aboriginal land rights. It has been suggested that the government should enter into a treaty with the Aborigines.<sup>118</sup> The pact is to represent a belated recognition of Aboriginal title to the land and mark a formal cession to white Australia and allow for appropriate compensation to Aborigines.

So far, South Australia has recognized tribal titles. It has subsequently made substantial grants to the Aborigines in the territory.<sup>119</sup> Other States in the Australian Commonwealth have also started inquiries into the question of tribal titles. There is now a general recognition of "Aboriginal identity". The Australian Law Reform Commission, for instance, is currently engaged in studies in Aboriginal customary law with a view to making recommendations for its incorporation into the legal process in Australia. Despite these efforts and increased government funding, the Aboriginal problem is far from resolved. Aborigines are hardly represented in the political process and their participation in the administration is still very minimal.

#### SOUTH AFRICA

In the issue of racial discrimination, South Africa occupies a remarkable position and thus merits a lot of attention. In the previous cases examined, the victims of discrimination have been members of minority racial groups. In South Africa, it is the opposite. Out of a population of 20 million only 3.5 million are white. The rest comprise

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117. The World Council of Churches has been the most notable of such groups.

118. Berndt and Berndt, *The Aboriginal Australian. The First Pioneers* (1983), 123-127.

119. The South Australian *Pithantjarjara Land Rights Act 1981* vested title to a large area of the state in the Aboriginal people acknowledged as having traditional rights to it. (Berndt and Berndt, *id.*, 126)

70% Blacks and Indians and coloured peoples.<sup>120</sup> This majority is the object of South Africa's rigid system of racial discrimination - *apartheid*.

The origins of discrimination in South Africa lie deep in the history of the country. The earliest white settlement was recorded in 1652 when Van Reibeeck of the Dutch Indian Company established a colony with a group of men mainly Dutch and partly German in nationality.<sup>121</sup> They called the natives they met the 'Hottentot'. The latter were generally regarded as lazy so the settlers resorted to slave labour imported from West Africa, Mozambique or Angola. During the eighteenth century, a lot of the settlers spread out into the interior of the country as *trekkers* (sheep and cattle ranchers). For their extensive manual work, they relied mostly on the slave labour and that of the few Hottentots they could muster. As far back as this period the seeds of master-servant relationship between the white settlers and the black natives became established.

As the Boers (the white settlers) continued to move inland they encountered resistance from native nomadic tribes. There were occasional clashes that culminated in a war of extermination leading to the conquest of the tribes and the dominance of the *trekkers*. Over time the *trekkers* developed a unique kind of vernacular called Afrikaans. This provided a sense of unity among them and was later to serve as a source of cultural identity for all South African Boers.<sup>122</sup>

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120. Bunting in "Origins of Apartheid", in La Guma (ed.), *Apartheid, A Collection of Writings on South African Racism* (1972), 23-40, 27.

121. Brooks, *Apartheid. A Documentary Study of Modern South Africa* (1968), Introduction; Troup, *South Africa, An Historical Introduction* (1972), 38-74, 40-43; Hepple, *South Africa, a Political and Economic History* (1966), 40-53. On the history of South Africa generally see also Geen, *The Making of the Union of South Africa 1487-1939: A Brief History* (1947); Keppel-Jones Arthur, *South Africa: A Short History* (1975); Wilson and Thomas (eds), *Oxford History of South Africa* (1969).

122. The language was first written in 1861 but it was not until 1927 that it was officially recognized in the country.



### The Arrival of the British

At the beginning of the nineteenth century, two important developments took place: the British arrived in South Africa and took the Cape Colony by force, and the *trekkers* who were moving northwards inland, encountered the more powerful Bantu tribes moving southwards. Faced with the possibility of defeat, the *trekkers* requested British protection. The British offered military aid in return for control over the territory held by the *trekkers*.

After three decades of British administration, the *trekkers* became dissatisfied with the British Colonial bureaucracy and particularly with the equal administration of justice for the native tribesmen. They consequently left the Cape Province and moved inland in what came to be called "The Great Trek".<sup>123</sup> They established settlements in Natal, Orange Free State and Transvaal. However, all these were later annexed by the United Kingdom in 1843, 1848 and 1877 respectively.<sup>124</sup>

In the late nineteenth century the Boers once again expressed dissatisfaction with British administration. The situation deteriorated into anti-British violence leading to the Boer War of 1899. The hostilities ended in 1902 with the signing of a Peace Treaty between the British and the Boers.<sup>125</sup>

### The Evolution of Racist legislation

As part of the terms of the Peace Treaty, it was agreed that no franchise would be given to the natives or the non-white community until the introduction of self-government in the provinces. In 1906, Transvaal became self-governing; it was followed in 1907 by the Orange Free State.

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123. Rosenfeld, *The Great Trek* (1972), 19-23; Kruger, *The Making of a Nation* (1969), 6-8.

124. Rosenfeld, *id.*, 1791.

125. On the causes of the Boer War see generally Belfield, *The Boer War 1899-1902* (1975), particularly at 5-13.

Despite these developments, franchise was not introduced for the non-European community.

With the formation of the Union of South Africa in 1910, the South Africa Act imposed a definite colour bar on membership in the Union Parliament. This was followed by the enactment of the Native Land Act of 1931. It prohibited Africans from purchasing lands outside areas designated as reserves. They could only acquire titles to land in such areas with the special permission of the Head of State.<sup>126</sup> The significance of the 1913 Act was that it restricted the Africans, about three-quarters of the population, to only 13% of the land in South Africa.

In 1936, two new bills were introduced under what came to be called the Hertzog Legislation (named after General Hertzog). They were the Native Trust Land Act and the Representation of Natives Act. The former maintained territorial segregation, but increased the total area of land purchasable by Africans. The latter provided for a minimum representation for natives in the Cape House of Assembly but on a separate roll. It also granted token representation of natives in the four provinces and created an advisory Native Representatives Council.<sup>127</sup>

The 1936 developments were made possible by a coalition between the parties of General Smuts and General Hertzog. However, with the outbreak of WWII the coalition collapsed and General Smuts became the new Prime Minister. Under his premiership segregation became intensified and the advisory Natives Council was abolished.<sup>128</sup> In 1948, the Afrikaaner-based Nationalist Party defeated General Smuts. From this period onwards racial discrimination in South Africa took on a more institutionalized form.

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126. Simons and Simons, *Class and Colour in South Africa 1850-1950* (Penguin, 1969), 130-132.

127. See works cited in note 121.

128. *Ibid.*

## Apartheid

The word *apartheid* appears to have been first used in 1943. It became a very popular word in 1948 when it was used as a slogan and as part of the Nationalist Party manifesto.<sup>129</sup> It is believed to have accounted for the unexpected victory of the party in the 1948 elections.

In its most literal sense, *apartheid* means "apartness", i.e. the state of being segregated or separated.<sup>130</sup> In 1963 South African Premier Verwoerd explained the rational basis of apartheid:

Reduced to its simplest form the problem is nothing else than this: we want to keep South Africa white...keeping it white can only mean one thing, namely, white domination, not 'leadership' not 'guidance' but 'control', 'supremacy'. If we are agreed that it is the desire of the people that white man should be able to continue to protect himself by retaining white domination we say that it can be achieved by separate development.<sup>131</sup>

Such a blunt statement of the basis for apartheid was watered-down by the candid and apparently realistic explanations of Vorster in 1966:

I believe in the policy of separate development not only as a philosophy but also as the only practical solution in the interest of every one to eliminate friction, and to do justice to every population group as well as to every individual. I say to the coloured people as well as the Indians and the Bantus, the policy of separate development is not a policy which rests upon jealousy, fear or hatred. It is not a denial of human dignity of any one people, nor is it so intended.<sup>132</sup>

The good and sincere intentions inherent in Vorster's statement are not borne out by the objective realities of the South African situation. In fact, the blunt assertions by Verwoerd constitute a better explanation of

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129. *Ibid.*

130. *Apartheid* is an Afrikaan word. It is interesting to note that it was not translated but transported wholly in English vocabulary. A South African tried to explain this: "there is no reason why a translation such as, e.g., 'separation' could not have been used; but the intention was most probably to suggest, by the use of a foreign word in the English language, something foreign and ominous, something so bad that there was no word at all in English for it!" (Dawie) Bunting, *op.cit.*, note 120; Brooks, *op.cit.*, note 125,123,2.

131. Cited in *id.*, 28.

132. *Id.*, 24.

the segregation Policy. The 3.5 million whites of South Africa own and occupy 87% of the land and control the entire political system of the country. Until November 1983 Indians and coloured had no representation of any kind in the legislature.<sup>133</sup> Over 70% of the state's expenditure is spent on the white minority population.<sup>134</sup> It is estimated that the average wage of a white worker is ten times more than that of the black worker. The plight of the non-European in South Africa is summed up by Alex La Guma:

The majority of the people, the non-white, are subject to the worst form of colonial subjugation. They are neither independent nor free. They are landless, ... and compelled to provide cheap labour.<sup>135</sup>

*Demands:* Like the other cases in this category, South African nationalists demand equality. However, their peculiar majority position puts a lot of implications on such a demand. Equality would mean the introduction of the "one man one vote" system in South Africa. To the minority white population, such a franchise would constitute the definite destruction of their privileged status. It would not only mean institutionalizing their position as a minority group but it would also entail the possibility of their total exclusion by the overwhelming majority from the political process in the country. This demand poses a dilemma even for the most liberal of South African whites.

Up to 1961, the main types of resolution techniques adopted by the nationalists were protests and general civil disobedience organized under the auspices of the African National Congress, the Communist Party of South Africa, and the South African Indian Congress.<sup>136</sup> After 1952

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133. See page 242, *infra*.

134. La Guma (ed.), *op.cit.*, note 120, 13-14.

135. *Ibid*.

136. After 1961, members of the banned political organizations mostly from the ANC went underground to organize guerrilla activities in pursuit of their demands. For a detailed discussion on the activities of the nationalist groups see: Slovo, "South Africa, No Middle (contd)

these organizations were either dissolved or banned with the introduction of the Suppression of Communism Act. Nationwide protests in 1960 and 1976 resulted in the shooting incidents of Sharpville and Soweto respectively. These two cases helped to heighten international concern over the South African situation.

There has been considerable international involvement in the South African case. The matter first came to the General Assembly in 1946 when India and Pakistan protested over the treatment of peoples of Indian and Pakistani origins in the country.<sup>137</sup> In 1952 the Assembly set up an ad hoc committee to study the racial situation in South Africa. In 1954 the Committee found that the country's racial policies were contrary to the U.N. Charter and to the Universal Declaration on Human Rights.<sup>138</sup> The Assembly developed a greater interest in the issue with the shootings in Sharpville and with the increase in the African and Third World membership of the United Nations.

The General Assembly has recommended a diplomatic, economic and cultural boycott of South Africa in an attempt to induce changes in its racial policies.<sup>139</sup> Since the Assembly's resolutions are generally not binding, the boycott is only respected by a few states mostly from Africa. The Security Council has ordered an arms embargo against South Africa,<sup>140</sup> while OAU states have generally severed trading links with it. States of the British Commonwealth also maintain a sports embargo against it under the Gleneagles Agreement.

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136. (contd) Road", in Davidson, Slovo and Wilkinson (eds), *Southern Africa, The New Politics of Revolution* (1976), 150, particularly 154-178.

137. For a detailed discussion of the Indian-Pakistan-South Africa dispute see Ballinger, "U.N. Action on Human Rights in South Africa", in Luard, *The International Protection of Human Rights* (1967), 248-284.

138. *Id.*, 255.

139. See for instance G.A. Res. 2506A (XXIV), and 2506B (XXIV).

140. S.C. Res. 181 (1963) and 182 (1963) and 191 (1964).

For its part, South Africa has made attempts to modify some of its *apartheid* laws. In November 1983, it granted representation to Indians and coloureds after a nationwide referendum on the question.<sup>141</sup> Despite these developments the basic policy of *apartheid* still remains the basis of South African society and the country's black majority are still denied any representation or equality. The government introduced the idea of the Bantustans as a solution but this has been rejected by the international community. For all practical purposes however, South Africa is still committed to the idea of the Bantustan. There is no indication of change in its racial policies in the near future. The problem remains unsolved.

#### General Remarks

On the basis of the cases examined one can make the following broad observations: Racial discrimination presupposes the diffusion of races within a community. This factor determines the practical limits of separatist activity and the corresponding demands. As a general rule, the claimant groups in this category do not seek secession or any form of physical separation from the body politic. The practical realities of diffusion prevent any such demands. The claimants consider a grant of social and political equality and an acknowledgement of their cultural identity as an adequate measure of self-determination.

Racial discrimination is usually prohibited under the various domestic legislation in most states, consequently, remedies for discrimination are available within the municipal legal systems. Separatist

141. The referendum supported by a 65.95% majority of the voters introduced constitutional reforms which allowed the formation of a cabinet drawn from the white, coloured and Indian racial groups who constitute the legislative chamber. Under the new constitution South Africa's executive President is to be elected by an electoral college of 50 whites, 25 coloureds and 13 Indians. The Blacks were not given any concessions in the new arrangement. The *apartheid* system of South Africa is also to remain unchanged. (See African Research Bulletin, Nov. 1-30, 1983, 7043-48.)

activity is thus normally restricted to seeking solutions within the domestic structure where there are available domestic remedies. International intervention through the United Nations organs or non-governmental organization becomes necessary only where there are no domestic remedies (as in South Africa) or where the remedies, if existent, are ineffective.<sup>142</sup>

##### 5. RELIGIOUS DIFFERENCES

Religion as a way of life and a source of faith, provides a pervasive influence on group beliefs and community behaviour. Even though it teaches the finer virtues of life, it could also generate the basis of inter-group antagonism. Such a situation arises where religious differences in the community breed a minority and the latter is subsequently excluded from the power sharing and value processes. The emphasis then, is on religious differences that are coterminous with established patterns, e.g. wealth, class and power in the society. These disparities provide the foundations for discontent and the desire of the minority to look for a remedy through a process of self-determination.

Separatism in such cases represents the minority's desire to create an environment that would enhance the pursuit of its religious beliefs and above all, ensure its control of power and participation in the value processes. The leading cases in this category are the Northern Ireland and the Southern Sudan.<sup>143</sup>

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142. Other claimant groups which could be classified under this claim category include the Tamils of Sri Lanka, the Indians of the United States and Canada, the Blacks of Brazil and the Brazilian Indians.

143. One could also include the Moros, the muslims of the Philippines. Even though the Philippines is a secular state, the extensive practice of Catholic faith virtually makes it a *de facto* religious state with Catholicism as the chief religion. The Moros have the advantage of being confined to a defined or distinct territorial base. In the late 1960s and in the 1970s they made successive attempts to secede with the aid of Libya. In more recent times, the Moro problem has been contained with the Filipino government denying their existence or significance. Before the partition of India, the Hindu-Muslim confrontations could have been classified under this

Due to the close relationship between "religious differences" and deprivation of wealth or power, it is proposed to discuss the Southern Sudan case under the next claim category "Disparities in the distribution of Wealth Resources and Power".<sup>144</sup> This is because despite the religious factor in the Sudanese case, the economic and political discontent in South Sudan received the widest attention. Since the Northern Ireland case is principally associated with religious differences as such, it is considered more appropriate for this category.

#### NORTHERN IRELAND

The Northern Ireland case represents the most disturbing example of social disharmony founded on religious differences. The country covers an area of 5,242 square miles. It has a population of over 1,500,000 out of which there is a Protestant majority of 65.1% and a Catholic minority of 34%.<sup>145</sup> Ireland as a whole (i.e. both the North and the South or the Republic of Ireland) comprises thirty-two counties, six in the North\* and the rest in the South.

The current crisis in Northern Ireland started in the 1960s, but the origins of Protestant-Catholic antagonism lie deep in Irish history. The thirty-two counties of Ireland were converted to the Catholic faith in 432 A.D. with the arrival of Saint Patrick in the country. In the twelfth century Pope Andrian (an English Pope) is said to have requested King Henry IV to help reform Ireland by strengthening full Papal authority. This marked the inception of British influence in the territory. However, successive English kings could not conquer

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143. (contd) category. The demand by muslims in the subcontinent for a separate state was a classic example of nationalism founded on religious aspirations and the desire to ensure an adequate control of political power. Other claimants in this category are the Christians of Lebanon, the Kachins of Burma, and the Sikhs of India.

144. See page 250, *infra*.

145. Jackson, "The Two Irelands, A Dual Study of Inter-Group Tensions", M.R.G. Report No. 2 (1979), 15.

\* See Figure VI at page 274, *infra*.



Ireland totally.<sup>146</sup>

In the sixteenth century, Papal authority was abolished in England. The English sought to abolish Catholicism in Ireland too. Henry VIII was declared "King of...Ireland annexed and knit forever to the Imperial Crown of the realm of England". Despite the new wave of Protestantism that came with the declaration, some Catholic priests and Jesuits continued to preach Catholicism and thus kept the Catholic faith and traditions alive among most Irishmen.

After King Henry VIII, English attempts to subjugate Ireland took on a religious significance. The army of Elizabeth was said to have routed Irish Catholic forces. A Catholic rebellion that followed was quelled immediately by Queen Elizabeth who confiscated the lands of the O'Connor clan that had supported the rebels. England subsequently "planted" loyal Protestant English colonists on the seized lands and thus created the first of what came to be called the "English plantations".<sup>147</sup>

After the O'Connor confiscations, more plantations followed. In 1601 Queen Elizabeth defeated Hugh O'Neill, the Earl of Tyrone and his Gaelic Catholic Irishmen. All his lands, six out of nine counties in the region of Ulster, were confiscated and planted with Scottish Protestants. Under King James I, more lands were seized from native Irishmen and given to English and Scottish Protestants. Thus by 1640 most property in Ireland was owned by Protestants. The general situation provided the basis of wealth for Protestants and deprivation for Catholics. It also generated the necessary fuel for the Catholic-Protestant antagonism. In most parts of Ireland, the tensions were relatively mild since the English and Scottish had been absorbed into the original Irish

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146. For a comprehensive discussion of the history of Ireland see Kee, *Ireland: A History* (1980); Otway-Ruthven, *A History of Medieval Ireland* (1967); Simms, *Jacobite Ireland 1685-91* (1969).

147. See generally Carry, *The Elizabethan Conquest of Ireland: A Pattern Established 1565-1576* (1976), particularly Chapt. 4, at 66.

community through intermarriages. However, in Ulster where the Scottish Protestant community was concentrated, and generally despised the poor Irish Catholics, the antagonism survived and continues today.

### The Incorporation of Ireland into the United Kingdom

By the late eighteenth century dissatisfaction among the Catholic majority was mounting. Deprived of land and political rights, the Catholics took to demonstrations and other forms of protest. Alarmed at the general situation of unrest, the Protestant minority accepted a parliamentary union with England. Ireland was subsequently incorporated into the United Kingdom in 1801. In 1829 the Catholics were granted political rights. The politics of Ireland then became a struggle between two main forces. There was on the one hand the Protestant Unionists. They sought to maintain the union with the Protestant dominated United Kingdom. There were on the other hand, the Irish Catholic Nationalists, the majority, who demanded home rule for Ireland.<sup>148</sup>

By the beginning of the twentieth century, Irish separatist nationalism had become very much alive in the politics of the United Kingdom. In 1916, a group of republicans declared the "Republic of Ireland" in an armed uprising. It was aborted and the group subsequently executed.<sup>149</sup> In 1918 the Republicans won most of the seats in the general election. They proclaimed a national parliament which led to the outbreak of a war of independence against England between 1919 and 1920.<sup>150</sup>

### The Partition of Ireland

In a move to diffuse the tensions in Ireland, the Westminster Parliament passed the Ireland Act which partitioned Ireland in 1920.

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148. Beckett, "Northern Ireland", *Contemporary History*, Vol. 6 (1971), 121-132, at 122.

149. Jackson, *op.cit.*, note 145 *supra*, 13.

150. *Ibid.*



FIGURE VI. THE SIX COUNTIES OF NORTHERN IRELAND.

The six counties of Ulster with the Catholic minority constituted Northern Ireland.<sup>151</sup> The South comprised the remaining 26 counties and the city of Dublin. Each 'state' was to be an autonomous part of the United Kingdom.

In the South, the arrangement under the Partition Act was not implemented. It was rather replaced by the Treaty of 1921 which established Southern Ireland as the Irish Free State. In Northern Ireland, the Partition Act became operative. Thus only Ulster became an autonomous part of the United Kingdom. The exact boundaries between

151. Two out of the six counties had a Catholic majority, (Figure VI).

the two Irelands were settled in 1925.

The partition had significant implications on Catholic-Protestant relations in Northern Ireland. For the Catholic minority it represented a break from their Southern majority compatriots and an undesirable association with the Protestant dominated United Kingdom. It also meant living under a Protestant controlled local administration. For the Protestants, a complete union with the United Kingdom was very desirable given its Protestant sympathies. They accepted the status of autonomy reluctantly. It was a compromise between a complete break from the United Kingdom and total incorporation. Since the partition, the Catholics have insisted on a union between the two Irelands with the Protestants vehemently opposing any such association.

Serious agitation among the Catholics in Northern Ireland started after the partition in 1920. The general discontent led to an uprising in 1922. In the same year, general Irish discontent with the United Kingdom became evident when civil war broke out in the Irish Free State over support and opposition for the Treaty of 1921. The state became a republic in 1935 and withdrew from the Commonwealth in 1949. In 1968 civil rights agitation in Northern Ireland by Catholics resulted in serious rioting in Londonderry. In the face of the threatening disturbances the Protestants appealed for effective central governmental control. In 1972 the Westminster Parliament reinstated direct rule over Ulster to control the situation. Since then, the Catholics and the Protestants have been locked in a fierce conflict with the Catholics maintaining that the British army has taken sides with the Protestants in its policing duties.<sup>152</sup>

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152. For detailed discussions of the Northern Ireland problem see generally Fitzgibbon, *The Red Hand: The Ulster Colony* (1971); Younger, *Ireland's Civil War* (1968); Darby, *Conflict in Northern Ireland. The Development of a Polarized Community* (1976); The Sunday Times Insight Team, *Ulster* (Penguin, 1972); Elliot and Hicki, *Ulster. A Case Study in Conflict Theory* (1971).

Demands: The Catholics seek an end to British rule. This could pave the way for their union with the Republic of Ireland. Their demands are thus basically secessionist. The significance of any such union is that it would put the Catholics within an Irish community with a majority of Catholics and enhance their participation in the power sharing and other value processes. This potential advantage for the Catholics constitutes a possible disadvantage for the Protestants. For them a continued relationship with the United Kingdom would ensure their place in the safety of Protestant United Kingdom and protect their control over the wealth resources and power in the territory.

The Catholics formed the Irish Republican Army (IRA) to back their republican demands in the 1920 period. Today it still exists and pursues a solution to the Irish problem through force and terrorism. Apart from the violence of the IRA, riots and protests have also been employed by the nationalists to back their demands. Even though attempts were made to solicit international support in the WWII period and the years after,<sup>153</sup> the Irish have pursued their solutions within the domestic jurisdiction of the United Kingdom. The latter has tried to contain the situation by using military force. While this has been largely successful, there have been occasional outbursts of violence and acts of terrorism which only underscore the fact that the basic problem in Ireland remains unsolved.<sup>154</sup>

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153. The problem of Northern Ireland came before the European Court in 1957 in the *Lawless Case*. However, the issues related only to the treatment of prisoners taken from the conflict. In recent times, the political committee of the EEC has indicated that it may have to investigate the problem in Ulster. Nevertheless, the matter still remains confined to the British domestic scene (*Lawless Case*, Int'l.L.R., Vol.24 (1957), 420). See also Peter Taylor, *Beating the Terrorists?* (Penguin Special, 1980).

154. A possible solution has been suggested by Archer. He argues that a negotiated independence for Northern Ireland has the greatest chance of bringing together the two factions - Protestants and Catholics. "Northern Ireland: Constitutional Proposals and Problems of Identity", *Review of Politics*, Vol. 40 (1978),  
(contd)

## General Remarks

The case of Northern Ireland stands on its own in this category. One can nevertheless comment generally on the issue of religious differences. The latter, in themselves, do not breed separatism unless they constitute the basis of other material differences entrenched in the historical and cultural ethos of the society. In a state that professes freedom of religion, it is difficult for a group to direct its claims against the state as such. The best remedy may be comprehensive constitutional reforms to correct the imbalance. This issue will be discussed further in the later stages of this work.<sup>155</sup>

### 6. DISPARITIES IN THE DISTRIBUTION OF WEALTH AND POWER

A claim to self-determination represents a group's desire for effective participation in power sharing and adequate measure of control over the wealth and resources of the community. Almost all post-colonial self-determination claims thus involve grievances such as insufficient participation in the central government, discrepancies in economic benefits, disparities in the standards of living, unequal social burdens and unequal opportunities, etc. There is, in effect, a materialistic element to such claims. Sometimes, this element constitutes the fundamental basis of separatist activity. In such cases, there may be discernible traces of ethnic sentiments; however, ethnicity in itself does not account for the separatist agitation. It is only a catalyst and responds to external stimuli - which consist of material discrepancies or disadvantages that coincide with ethnic boundaries. Examples of such cases in this category are Katanga,

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154. (contd) 255-70. Other recent solutions suggested include: complete unification with the Republic of Ireland, a Joint Anglo-Irish rule of Northern Ireland, and a federation of Northern Ireland and the Republic of Ireland.

155. Page 336, *infra*.

Quebec, and the Southern Sudan.<sup>156</sup>

#### THE SOUTHERN SUDAN

The Republic of Sudan has two main political regions - the North and the South. The peoples of the North, about 12 million, are of Arabic descent and are generally Muslims. The South has a population of 4 million people of negroid descent, and who are also Christians.

It is believed that the South had no contact with the outside world till the nineteenth century. After its discovery it became famous as a source of ivory and slaves and was controlled by Egypt.<sup>157</sup> In 1885 the British took over the Egyptian possessions in the North and the South and thus came to administer the Sudan. The territory was however regarded as two distinct units. In 1946, the British changed their policy on the two Sudans. In a report, it was noted that:

the peoples of the Southern Sudan are distinctly African and Negroid, but that geography and economics combine...to render them inextricably bound for future development to the Middle Eastern and Arabicized Northern Sudan; and therefore to ensure that they should, by educational and economic development, be equipped to stand up for themselves as socially and economically the equals of their partners in the Sudan of the future. 158

In 1947, Southern leaders agreed to the unification. They however, insisted "on the southerners' needs for protection and for

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156. In Bangladesh the issue of wealth and power distribution also played a significant role. See Nanda, *op.cit.*, note 47. Imbalances in wealth and power distribution have also been used to explain at least in part, the basis of separatism in Spain (i.e. Catalan and Basque) see McMillion, "International Integration and Intra-national Disintegration: The Case of Spain", *Comparative Politics*, Vol. 13 (1981), 291-313.

157. By the year 1867, it was estimated that about 1800 slaves a year were being taken out of the region. The slave dealers were mainly Arabs who came through the North (Gray, "The Southern Sudan", *Contemporary History*, Vol.6 (1971), 108-120 at 112). For a comprehensive discussion on the history of the region see generally the same author's work, *A History of Southern Sudan 1839-1889* (1961); Rahim, *Imperialism and Nationalism in the Sudan* (1969).

158. Quoted in Morrison, *The Southern Sudan* (1968). 82.

further time to consider the matter with the elders of the people".<sup>159</sup> The guarantees were not given and no further consultations took place.

In 1948, a unified Sudan convened its first Legislative Assembly with 22 Southerners out of a total of 60 members. In 1953, the Anglo-Egyptian Treaty on the Sudan granted the latter internal self-government.<sup>160</sup> Egyptian administrators promised to give the South 40 senior positions in a new program of Sudanization to prepare the country for independence. In 1953 the positions were allocated according to seniority, experience and qualifications. Since there were only a few qualified Southerners, only four senior posts out of 800 went to the South.<sup>161</sup>

The Sudanization scheme became a disappointment to the Southerners. They regarded the entire situation as merely changing the British alien for the Northern alien. Dissatisfaction became quite intense and provided grounds for a general anti-Northern sentiment. In 1955 there were massive demonstrations in the South over the dismissal of Southern factory workers. This was followed by a mutiny in the Southern Corps in which several Northern officers were killed.<sup>162</sup>

In negotiations that followed these disturbances, the Southern leaders demanded a form of federation in which the South could be autonomous. The Sudanese parliament agreed to redress the complaints of the South after independence which came in 1956. However, in 1957, a committee that studied the Southern problem recommended the maintenance of a unity system. By 1958 Southern separatism had taken on a more definite and persistent form. Southern leaders walked out of parliament. Amidst the general chaos in the country, the military took over in a *coup*.

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159. Bashir, *The Southern Sudan* (1968), Appendix 9 (Minutes of the Conference).

160. The Treaty is reproduced in U.N.T.S., Vol. 161 (1953). 157.

161. Morrison, *op.cit.*, note 158, 12.

162. *Id.*, 13; Gray, *op.cit.*, note 157, 118.



The new military regime led by General Ibrahim Aborid tried to contain the Southern problem through Arabicization of the region. All Christian missionary schools were abolished and new Arabic institutions established. Christian holidays were abolished and Arabic holy days substituted. The anti-separatist stand of the government drove several Southern leaders into exile in the Congo where they formed the Sudan African National Union (SANU). Inside Sudan, youthful Southerners formed the ANYA NYA freedom fighters movement in 1963 to pursue the separatist demands by force and terrorism.<sup>163</sup>

In 1964, a new military government was formed. The administration now included three Southern Sudanese ministers. But this did not resolve the basic disparities between the North and the South.

#### Core-Periphery Relations

The inability of the administration to satisfy the Southern demands was basically due to an established "core-periphery" relationship between the two regions.<sup>164</sup> The North comprises the fertile Nile Bend, the cosmopolitan Khartoum Province and the rich cotton growing Gesira District. The light-skinned Arabs of the North were better

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163. On the activities of the Anya Nya and the conduct of the guerrilla war see generally Reed, "A Journey to a War", in *The Grass Curtain I*. (May, 1970). See also the account given by Morrison, *op.cit.*, note 158, 19-21.

164. A "core-periphery" relationship arises between two regions where a more developed region (i.e. the core) is imposed on a less developed region (the periphery) whose resources are used or geared towards sustaining the development of the core. Under such conditions, development in the periphery region is reduced to that of a dependency analogous to a colony's relationship with a metropolitan state. A structural division of labour may arise from a given "core-periphery" relationship in which the members of the periphery are allocated specific low-status jobs while high-status positions remain the preserve of members of the core. Because of the analogy between the core-periphery syndrome and colonialism, some authorities commonly refer to the core-periphery relations as internal colonialism (see generally, Hetcher, *Internal Colonialism: The Other Fringe of British National Development 1536-1966* (1975)); Anders, "Internal Colonization of Cherokee Native Americans", *Development and Change*, Vol. 10 (1971), 41; Moore, "Colonialism: The Case of Mexican American", *Social Problems*, Vol. 17 (1970), 463.

educated and usually wealthier. As the early recipients of Western education in Sudan they also possessed the skills required for the administration of post-independence Sudan. Thus the North has historically always been the centre of commercial, educational, political and industrial power, and the homeland for leading Sudanese elite.<sup>165</sup>

The South has, on the other hand, always played a peripheral role in the Sudan. In historical times it exported ivory and then slaves to work on the rich cotton fields of the North. There was a general lack of education and no serious economic activity. Given the control by the North and the special elitist needs of the region, most of the national wealth was devoted to the North. It was for instance, estimated that after independence, 45 new secondary schools were built in the North; only 3 were established in the South. 13 Southerners were commissioned into the army as compared with 483 Northerners. 166 people were accepted for police officer training; only 13 came from the South.<sup>166</sup>

#### Attempts to Resolve the Problem

In March 1965, a Round Table Conference was convened to discuss the Southern problem. Division within the ranks of the SANU and the unwillingness of the Northern elite to make concessions led to a breakdown of the talks. In July, a dispute broke out in the South leading to the massacre of 3,000 Southern civilians. Separatist activity intensified with the Anya Nya engaging in a full scale guerrilla war against government forces.<sup>167</sup>

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165 A brief but interesting discussion on the core-periphery analogy in respect of the relationship between the two Sudans is given by Badal in "The Rise and Fall of Separatism in Southern Sudan", *The Politics of Separatism*. Collected Seminar Papers, No. 19, University of London, Commonwealth Studies (1975), 85-93 at 87-88.

166. Gray, *op.cit.*, note 157, 117.

167. *Id.*, 120. Morrison, *op.cit.*, note 158, 16.

The protracted war continued until 1969 when General Numeiry seized power in a military *coup*. In an attempt to resolve the Southern problem he undertook extensive reforms, culminating in the 1972 Addis Ababa Accord under which all hostilities were terminated and separatist action ended.

Demands: Southern separatism was generally an expression of discontent with the Northern-controlled centralized system of wealth distribution that favoured the North. At the 1965 Conference the Southern Front Party (S.F.P.), a splinter group from ANU, compared the South with a colony and argued for its right of self-determination. The S.F.P. thus took a secessionist position. Other Southern leaders rather preferred an autonomous status for the region within Sudan. Even though the demands of Southern separatism vacillated between these two goals, the autonomists generally won the most support among Southerners. The chief demand of both the secessionists and the autonomists was the resolution of the economic and political imbalances between the two regions.

When General Numeiry came to power in 1969, he voted £3 million to repair war damages in the South. To redress the disparities he introduced a recruitment program for Southerners into the army and the police force. He appointed a Southerner as the head of a special Ministry for Southern Affairs and proceeded to include other Southerners in his cabinet.

Perhaps the most significant step to redress the problem was the recognition of the South as an autonomous region under the Addis Ababa Agreement of 1972. Details of the accord were enacted in the National Constitution as the Southern Provinces Self-Government Act (1972). It provided for a regional House of Assembly and a High Executive Council with a president who is also the vice-president of the Republic of Sudan. Apart from guarantees of representation in the national parliament and

the central government, the constitution also provides for a Regional Development Corporation to ensure the economic and social development of the region.

The Numeiry experiment to placate the separatists has proved to be a great success in the Sudan.

#### KATANGA

Katanga comprises the present day Shaba Province of Zaire. In 1960 a secessionist attempt by the region attracted great international attention.<sup>168</sup> A major factor (if not the only motivation) for the secession was its enormous mineral wealth in copper, cobalt, uranium, zinc, cadmium, and tin.<sup>169</sup> The sparsely populated region had 13% of the Congo's population but it produced 80% of the country's minerals and contributed 45% of the annual budget. Mining investments in Katanga also produced \$47million annually in profits for the multinational concerns.<sup>170</sup> The region thus occupied a significant position in the overall economy of the Congo. It was equally important to the multinationals who invested in its mineral wealth.

The wealth of the territory and its general role in the economy of the Congo also provided grounds for dissatisfaction among Katangans who believed that revenue from the region should be used to develop the region. They were generally unhappy about the inequitable distribution of the burdens of maintaining the Congolese economy. The general view was that any advantages of being part of the Congo were offset by

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168. On the Katanga secession see generally the following works: Gerard Libois, *The Katanga Secession* (1966); Young, *Politics in the Congo. Decolonization and Independence* (1965); Hoskyns, *The Congo: A Chronology of Events, January 1960 - December 1961* (1962); Lemarchand, "The Limits of Self-Determination. The Case of the Katanga Secession", *American Political Science Rev.* (1962), 404. Wright "Legal Aspects of the Congo Situation", *Int'l. Studies*, Vol. 4, 1962.

169. Mueller, *Africa Undermined* (Pelican, 1979), 230.

170. Buchheit, *Secession*, 142.

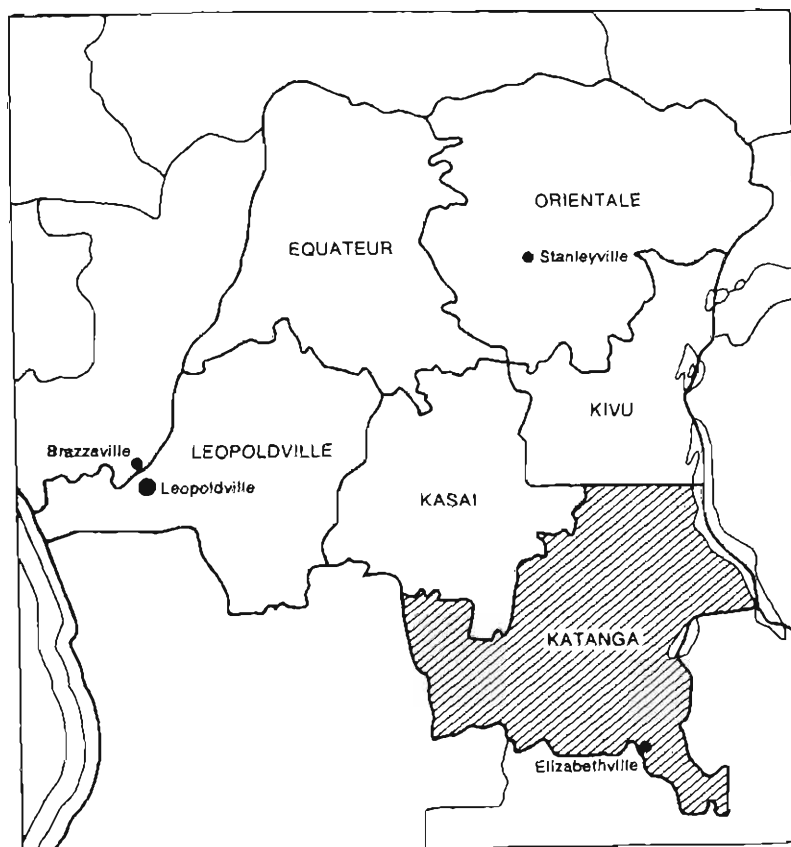


FIGURE VII. KATANGA AND OTHER PROVINCES OF THE CONGO (1960).

the possible benefits of an independent or autonomous Katanga.

#### The Secession

On the eve of independence of the Belgian-administered Congo, all the local political parties were summoned to Brussels for a Constitutional Conference. In Brussels, Katanga, represented by a regional-based party, Conakat, demanded autonomy. At home, the Conakat officials awaiting the outcome of the conference resolved that if the autonomy proposals were rejected Katanga would secede.<sup>171</sup> In the end, the conference made concessions to Conakat which were accepted as satisfactory by the party leader, Moïse Tshombe. Back home, however, the desire for secession remained attractive to the Conakat.

In June 1961 the Congo became independent with Patrice Lumumba as Prime Minister and Kasavubu as President. A few days after the

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171. Nwabueze, *Constitutionalism in the Emergent States* (1973), 259.

proclamation, civilian riots and mutiny in the army broke out in the country leading to a general situation of unrest. Tshombe quickly appealed to Belgium for troops to help maintain order in Katanga. The troops arrived on July 10 and Tshombe immediately declared Katanga independent. The central government appealed to the United Nations for military assistance against the intervention of Belgium which was regarded as aiding "the secession of Katanga with a view toward maintaining a hold on our country".<sup>172</sup>

*Demands:* Katangan separatism was a manifestation of a desire to control the local wealth for the exclusive benefit of the territory. Secession was therefore the greatest attraction.<sup>173</sup>

Following the central government's appeal to the United Nations, the Security Council authorized the Secretary-General to provide the Congolese Government with the necessary military and technical assistance until the country's security forces were able to deal with the situation fully on their own.<sup>174</sup> A United Nations force was consequently sent into the Congo. The Secretary General, Dag Hammarskjöld, emphasized that the force was not meant to enforce "any specific political solution of pending problems or to influence the political balance decisive to such a solution".<sup>175</sup> In a later statement, the Secretary General explained further that "the question between the provincial government and the central government would be one in which the United Nations would in no sense be a party and on which it could in no sense exert an influence".<sup>176</sup>

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172. Message contained in telegrams dated July 12, 13 (1960). U.N.S.C.O.R., Vol. 5 Suppl. (July/Sept 1960), 11.

173. Libois, *op.cit.*, note 168, 41-42.

174. S/4387, U.N.Doc. U.N.S.C.O.R., Vol.15, Suppl. July/Sept. (1960), 16.

175. *Id.*, 19.

176. *Id.*, 64, para.6, U.N.Doc. S/4417/Add.6 (1960). The Secretary General cited the precedent of the U.N. forces; activities in the Lebanon in 1958 to support his position on the issue

After the assassination of Lumumba in February 1961, the United Nations' attitude towards the conflict changed dramatically. The Security Council acknowledged the "imperative necessity of the restoration of parliamentary institutions in the Congo in accordance with the fundamental law of the country".<sup>177</sup> Following the death of Dag Hammarskjöld, the Security Council deplored "the secessionist activity ...by the provincial administration of Katanga" and rejected "completely...the claim that Katanga is a sovereign independent nation". More significantly the Council declared:

that all secessionist activities against the Republic of the Congo are contrary to the *Loi fondamentale* (the Constitution) and Security Council decisions and specifically demands that such activities...shall cease forthwith.<sup>178</sup>

Amidst threats of United Nations' economic sanctions against Katanga, war broke out between Katangese forces and the United Nations' force. By early 1963 Tshombe had given up, and the secession aborted for all practical purposes. The United Nations' intervention thus played a significant role in the resolution of the conflict.

#### QUEBEC

Some French Canadians in Quebec demand secession of the province from Canada. Their agitations culminated in a referendum in 1981. Even though the results indicated a majority desire to remain a part of Canada, the referendum underscored the separatist sentiments of a substantial number of French Canadians who consider themselves underprivileged, exploited and the object of social discrimination.<sup>179</sup>

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176. (contd) (*id.*, 6415, para.3). The Security Council later passed a resolution adopting the same position (*id.*, 91, 92, U.N. Doc. S/4427 (1960).

177. U.N.S.CO.R. 16, Suppl. (Jan-March 1961), 147-148, U.N.Doc. S/4741.

178. *Id.*, Suppl. (Oct/Dec 1961), 148, U.N. Doc. S/5002.

179. On the separatist activity in Quebec see generally Carey, "Self-Determination in the Post-Colonial Era. The Case of Quebec", (contd)

Quebec was founded by a group of French settlers in 1608 as part of the colony of New France. The French controlled the territory until the British conquest of 1760. Thereafter, it passed into the hands of the British. The colony was ceded formally to Britain in 1763 by Louis XV under the Treaty of Paris. After the cession all French officials left. However, French priests, peasants and a handful of businessmen stayed. After the American Revolution there was an influx of English settlers, particularly Loyalists from the war, into the British colony in Canada. In 1791, The Canada Act divided the area into two: a homogeneously English Upper Canada (Ontario) and a predominantly French Lower Canada (Quebec).

In 1840, the division between Lower and Upper Canada was abolished. The new Dominion of Canada was formed in 1867 when the British North America Act (BNA) joined the United Canadas with New Brunswick and Nova Scotia into the Canadian Confederation. Quebec enjoyed an autonomous status in the confederation; and so did the other units. In 1931, Canada became independent as a federal state.<sup>180</sup>

#### Sources of Discontent and Separatism in Quebec

Discontentment and the separatist sentiments among the Quebecois began with the defeat of the French in 1760 and the cession

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179. (contd). A.S.I.L.S., Int'l.L.Journ, Vol. 1 (1977), 47-71; *Umozurike*, 256-259; McRoberts, "Internal Colonialism, The Case of Quebec", *Ethnic and Racial Studies*, Vol. 2 (1979), 293-317; Spry, "Canada: Notes on Two Ideas of a Nation in Confrontation", *Contemporary History*, Vol. 6, 1971, 173-196; Trudeau, *Federalism and the French Canadians* (1968); Bercuson (ed.), *Canada and The Burden of Unity* (1968); Corbett, *Quebec Confronts Canada* (1976); Johnson, "The Dynamics of Federalism in Canada", *Canadian Journ.Political Science*, Vol. 1 (1968), 18-39; Legendre, *French Canada in Crises: A New Society in the Making?*, M.R.G. Report No 44 (1980).

180. McRoberts, *id.*, 304.



of the territory to Britain.<sup>181</sup> The British victory had two significant implications: it opened the way for the influx of an English gentry who regarded the remnants of the defeated French as backward peasants, papist fanatics and narrow-minded Catholics.<sup>182</sup> Secondly, it destroyed the basis of French Canadian business interests. For instance, various obstacles, including a naval blockade, prevented the maintenance of trade relations with France. Contacts had to be found in Britain. Not surprisingly, the major commercial interests in England preferred to deal with their compatriots now established in Quebec. Cut off from markets, as well as sources of capital, French Canadian entrepreneurs soon fell into bankruptcy.<sup>183</sup>

These factors constituted the social and economic infrastructure that was to help the domination by the English in later years. By 1827, disparities between the influential English Canadians and the French Canadians had become apparent in Quebec in particular and in Canada as a whole. The French constituted three-quarters of the population in Quebec; but the Lower House had only 9 French Canadians out of 27 members. Out of 10 judges, only 3 were French. Between 1800 and 1827 the French Canadians got only 10 out of 30 judicial appointments. In all, the French Canadians occupied only about a quarter of the senior public positions.<sup>184</sup> The general discontent resulted in the

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181. Carey, *op.cit.*, note 176, 70. See also Ossenberg, "The Conquest Revisited: Another Look at Canadian Dualism", *Canadian Rev. of Sociology and Anthropology*, Vol.4, 201-218, Smiley, "The Canadian Federation and the Challenge of Quebec Independence", *Publius*, Vol. 8 (1978), 199-224; Cohen, "The Search for a Viable Federation", *Manitoba Law Journ.*, Vol. 3 (1969), 1-18.

182. Wagley and Harris, *Minorities in the New World* (1958) cited in *Umozurike*, 257.

183. McRoberts, *op.cit.*, note 179, 303-304.

184. *Umozurike*, 258.

first expression of Quebec separatism in the form of a rebellion in 1837. It was immediately quelled. "The failure of the revolt of 1837 ...profoundly affected the French Canadians. It was a ratification of their defeat and symbolic of English dominance which they came to despise".<sup>185</sup>

Modern industrial development with the turn of the twentieth century tended to follow definite patterns established in the post-conquest era. It thus favoured the English establishment in Quebec and in Canada as a whole. The French came to play only a little role in the industrialization of Quebec and Canada. Given the establishment of a favoured English gentry, the major sources of capital, whether English-Canadian, British or American, can only be expected to have had more confidence in Anglophone entrepreneurs. In view of this, Francophone enterprises were unable to expand beyond small operations based upon the pooled resources of a family, with perhaps some assistance from the relatively weak Francophone financial institutions.<sup>186</sup>

Historically, differential access to capital and markets disadvantaged French-Canadian entrepreneurs and created a permanent dominance of Anglophone enterprise. Apart from these enterprises, both ethnic discrimination and working language practices have hindered Francophone mobility. The pervasiveness of English dominance is noted by one author:

Complaints focus on the importance of the English language in Quebec life. The business world of most *Quebecois* is English-speaking because of the English speaking elite which dominates Quebec industry. The Canadian Army is English speaking. The French speaking universities, because of federally influenced policy, use text books which are watered-down translations of English language texts, rather than original French texts. Similarly the French language newspapers rely on translations of English language news sources. Fully half of all Montreal

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185. Carey, *op.cit.*, note 179, 70.

186. McRoberts, *op.cit.*, note 179, 304.

radio and television stations broadcast in English.<sup>187</sup>

The cultural problem is aggravated by obvious economic and social disparities. Even though the French Quebecans constitute 80% of the Quebec population, they control only 20% of the state's economy. Forest resources constitute the backbone of Quebec's economy, but most of such resources are owned and controlled by an English speaking business elite. Quebec's unemployment rate is higher than the Canadian national average and the *per capita* income of salaried employees is among the lowest in Canada. It is estimated that "on the average, French Canadians earn about 80 percent of what English Canadians earn, although the disparities are greater in Quebec."<sup>188</sup>

*Demands:* The dominant movement behind contemporary Quebec separatism is the *Parti Québécois*. The main objective of the party has been to reduce Quebec's internal cultural division of labour and to strengthen Francophone institutions generally. The party seeks to achieve these goals through an independent state of Quebec in which programs of social and economic equalization could be introduced. Admittedly, the Québécois are not happy with the disparities between them and the rest of Canada. However, this external issue is not the dominant problem in the politics of Quebec separatism.<sup>189</sup> Concern with internal change within Quebec itself is paramount among

187. Carey, *op.cit.*, note 179, 69.

188. *Id.*, 67, 68. For an analysis of the distribution of the costs, benefits and power in the Canadian federation with specific reference to separatism in Quebec see Kornberg, Clarke and Stewart, "Federalism and Fragmentation: Political Support in Canada". The *Journ.of Politics*, Vol. 41 (1979), 889-906, particularly 902-906.

189. For a different view see Milner and Milner, *The Decolonization of Quebec* (1973). They argue generally that Quebec is an economic colony of the United States. They thus advocate for the secession of the province to end the economic subjugation. Carey adopts a similar decolonization argument in the thesis. He however sees the subjugator as the rest of Canada controlled by the Anglophones (Carey, *op.cit.*, note 176, 67, 70).

adherents to Quebec independence. In a very real sense the debate over Quebec independence is more a debate among Quebecois over the proper organization of Quebec society than a debate about the Quebec-Canada relationship.<sup>190</sup>

On November 15th, 1976, the *Parti Quebecois* won the provincial elections in Quebec. Thus for the first time a pro-separatist government took office in Quebec. The new government immediately made it clear it did not have the people's mandate to declare the independence of Quebec. However, it was going to request such a mandate through a referendum. The central government indicated that it would not use force to stop a secession if the Quebecois majority desired it.<sup>191</sup> Thus in 1981 a referendum was conducted. The majority of the Quebecois chose a continued association with the rest of Canada. The Quebecois secessionist agitation was subsequently muted. What has not been resolved is the dominance of the English and the cultural and economic subordination of the French in Quebec - the two factors that provide the *raison d'etre* of Quebec separatism.

#### General Remarks

Except for Katanga, cases in this category are usually confined to the domestic scene. International involvement is thus minimal or

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190. McRoberts, *op.cit.*, note 179, 313. For a general discussion on the rights and demands of Quebec in relation to separatism see Rene Levesque, "For an Independent Quebec", *Foreign Affairs*, Vol. 54 (1976), 734-744. See also Matas, "Can Quebec Separate". *McGill Law Journ.*, Vol. 21 (1975), 387, for the view that Quebec has no right of secession. But see Mayer, "Legal Aspects of Secession", *Manitoba Law Journ.*, Vol. 3 (1968-69), 61; Greenwood, "The Legal Secession of Quebec", *University of British Columbia Law Rev.* (1978), 71.

191. Carey, *op.cit.*, note 179, 71. For a discussion of the role of the *Parti Quebecois* in the separatist movement in Quebec since 1976 see McRoberts, "Quebec and the Canadian Political Crisis", *Annals of the American Academy of Pol. and Soc.Sc.*, Vol. 433 (1977), 19-31; Clark, "Partnership and the *Parti Quebecois*: The Impact of the Independence Issue", *American Rev. of Can. Studies*, Vol. 8 (1978), 28-47; Glazier, "Separatism and Quebec", *Current History*, Vol. 72 (1977), 154-158 and 178-179.

non-existent. The Katanga case involved substantial international intervention. However, it was exceptional. The United Nations involvement was requested specifically by the Congolese government (to counter the Belgium intervention).

#### 7. TERRITORIAL RECOVERY

The issue of self-determination has featured prominently in some territorial disputes in post-colonial times. The principle in such cases is pursued by (state) third parties who make territorial claims founded on the historical relations with, and the origins and wishes of the resident population of the disputed territory. In these disputes the beneficiaries of the principle are the resident population. For the claimant states, the relevance of the principle lies in their positive belief that if the beneficiary residents should exercise self-determination they would opt to unite with them. The principle thus provides a promising method through which a claimant state could recover or gain title to a disputed territory.

Examples in this category include the Kashmir case and the Somali Ethiopia-Kenya problem. The Palestine issue basically involves territorial recovery. We therefore include it in this classification. However, it must be emphasized that in this case the Palestinians are both the beneficiaries and claimants even though there have been considerable interventions by Arab states on their behalf.

#### THE SOMALI-ETHIOPIA-KENYA DISPUTE

The Somalis are spread over the rectangular Somali Plateau in the Horn of Africa. Virtually homogeneous in culture, they occupy what used to be called British Somaliland, Italian Somaliland, the French territory of the Afars and Issas and the modern day Ethiopian provinces of the Haud and the Ogaden, and the Kenyan North-eastern Frontier District (NFD).

In 1960, the British and Italian Somalilands, united to form the Republic of Somalia. French Somalia later became independent as the Republic of Djibouti. Since its independence, the Republic of Somalia has pursued the unification with the remaining Somali areas (i.e. in Ethiopia and Kenya) on the basis of self-determination.<sup>192</sup>

#### The Basis of the Claims in Respect of the Ogaden

Between 1884 and 1886, Somali tribes in the Haud and the Ogaden accepted British protection under a treaty arrangement.<sup>193</sup> However in 1847, these territories were ceded to Ethiopia following its victory against the Italians in the Battle of Adowa which helped to establish it as a force in the region. In 1935, Italy invaded and conquered Ethiopia and annexed the Haud and Ogaden as part of Italian Somaliland. But in 1941, the British defeated Italy in their WWII campaigns and subsequently took over the Italian possessions. In 1946 it was decided that "British Somaliland, Italian Somaliland and the adjacent part of Ethiopia, *if Ethiopia agreed*, should be lumped together as a trust territory" (emphasis mine).<sup>194</sup>

Ethiopia did not agree to this plan, consequently, the Ogaden was returned to it in 1948. At the time the Somali Youth League protested and pleaded that:

We wish our country to be amalgamated with other

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192. For a comprehensive treatment of the Somali problem see generally the works of: Drysdale, *The Somali Dispute* (1964); Touval, *Somali Nationalism* (1963); Lewis, *The Modern History of Somaliland: From Nation to State* (1965); and particularly Hoskyns (ed.), *Case Studies in African Diplomacy: The Ethiopia-Somali-Kenya Dispute 1960-67* (1969). See also Brown, "The Ethiopia-Somaliland Frontier Dispute", I.C.L.Q., Vol. 5 (1956), 245.
193. There were two sets of agreements: the first consisted of accords concluded in 1884 and 1885 in which the Somali tribes agreed not to alienate their territories unless to the British. The second comprised four separate agreements concluded in 1886 providing for the protection of certain tribes and their territories (British and Foreign State Papers, Vol. 76 (1884-1885), 101-107, 1263-1269. See also Brown, *op.cit.*, note 192, 246-249.
194. British House of Commons Parl. Deb., Vol. 423, 5th Series (1946), 1841.

Somalilands...we Somalis are one in every way...  
There is no future for us except as part of a  
Greater Somalia. 195

Despite such pleas, the rest of the Somali territory (i.e. the Haud) was returned to Ethiopia in 1954<sup>196</sup> amidst Somali protests that (1) the residents of the Haud and Ogaden were not consulted; (2) the territories involved belonged to Somalia.<sup>197</sup>

In 1960 when Somalia became independent it resolved as part of its constitution that it "shall promote, by legal and peaceful means, the union of Somali territories".<sup>198</sup>

#### The Basis of the Claims in Respect of the NFD in Kenya

In 1891, Britain and Italy, using the Juba River, delimited the exact boundaries between Italian Somaliland and British East Africa. Later in 1924, the British ceded part of their possession in the Juba area to Italy as part of a secret agreement. The rest of the Juba area which remained part of British East Africa later came to be called the North-East Frontier District in Kenya (NFD).<sup>199</sup>

In the 1940s, attempts to incorporate the NFD into the trust territory of Somalia failed. When Somalia became independent in 1960, efforts to secure the territory as part of the Greater Somalia scheme increased and thus caused the British government to institute consultations among the NFD residents to ascertain their wishes. The results indicated that -

195. See Touval, *op.cit.*, note 192 *supra*, 95.

196. U.N.T.S., Vol. 207 (1955), 284.

197. Report of the U.N. Advisory Council for Somaliland, 16 U.N. Trusteeship, Annex, Agenda Item No. 17, at 8, para. 54, U.N. Doc. T/1172 (1955) quoted in Buchheit, *Secession*, 180.

198. Article 6 of the Somali (1960) Constitution, reproduced in Peaslee (ed.), *Constitutions of Nations*, Revised 3rd ed. (1965), 788.

199. For a detailed discussion of the history of the NFD see Castagno, "The Somali-Kenya Controversy. Implications for the Future", J.M.A.S., Vol. 2 (1964), 165.

A substantial majority unanimously favour the secession of Kenya from the NFD when Kenya attains independence with the object of ultimately joining the Somali Republic. <sup>200</sup>

Despite the results of the consultation, the British Colonial Office decided to incorporate the NFD into Kenya and grant it autonomy within the state. Thus in 1963 Kenya became independent with the NFD as an integral part.

*Demands:* Somalia demands the unification of all Somali peoples in Kenya and Ethiopia. It pursues its demands through the right of self-determination for the Somali minorities in the Ogaden and the NFD in the hope that they would opt to unite with it. Its demands amount to a request for cession.

Both Kenya and Ethiopia reject outright the Somali secessionist demands. Kenya has consistently maintained that the principle of self-determination only applies when dealing with foreign domination and that it has no relevance in respect of dissident citizens. <sup>201</sup> The Kenyan attitude towards the Somali problem was summed up by one Kenyan delegate:

The Somalis are Africans. Africans in Kenya are Kenyans. Either they integrate with the rest of the Africans in the country or, as Mr. Jomo Kenyatta told them in 1962 "pack up your camels and go to Somalia". This is the only way they can legally exercise their right of self-determination. <sup>202</sup>

Since its independence, Somalia has been involved in a series of armed conflicts with Ethiopia. The OAU has spared no efforts to intervene in these conflicts, however the basic dispute between the parties remains unresolved. <sup>203</sup> The Somali claims, if successful, would

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200. Northern Frontier District Commission Report, British Cond. Papers, No. 1900 (1962), 18; see also another report on the question issued by the Regional Boundaries Commission in *id.*, No. 1899 (1962), 16. In both reports it was also noted that some of the Somalis preferred a transitional period of British control before joining the Somali Republic.

201. See Emerson, *Self-Determination Revisited* (1964), 36.

202. Quoted in Hoskyns, *op.cit.*, note 192, 36 and 37.

203. For an account of the OAU's mediation efforts see generally *id.*, 50-65.



affect about 45,000 square miles and 80,000 square miles in Kenya and Ethiopia respectively. This makes the Somali pursuit of self-determination particularly objectionable to the states affected. The Somali problem remains a thorny issue in the politics of African unity.

#### KASHMIR

The strategic territory of Kashmir, about 84,000 square miles in size, shares boundaries with Pakistan, China, Afghanistan and the U.S.S.R. It acceded to India in 1947 and has since constituted a major source of tension between India and Pakistan.<sup>204</sup> The circumstances surrounding the accession should be briefly mentioned.

Before the independence of India and the partition of the sub-continent about a third of India comprised princely states - about 562 in all.<sup>205</sup> On the eve of the partition and independence, all of them except three exercised the option to join either India or Pakistan. One of the three was Kashmir which had a Muslim majority.<sup>206</sup> By mid-1947, it became obvious that the Maharaja of Kashmir was negotiating to accede the territory to Hindu dominated India. This sparked off an uprising by the Muslims of the territory who preferred accession to

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204. See generally Lamb, *Crisis in Kashmir* (1966); Potter, "The Principal legal and Political Problems Involved in the Kashmir Case", A.J.I.L., Vol. 44 (1959), 361; Lakhanpal, *Essential Documents and Notes on the Kashmir Dispute* (1965); Vupta, *Jammu and Kashmir* (1968).

205. See generally, Somervill, "The Indian States", B.Y.I.L., Vol. 11 (1930), 55-62; Sen, *The Indian Native States* (1930); Warner, *The Native States of India* (1910).

206. The remaining two were Junagadh and Hyderabad. The former had a Hindu majority. On the eve of independence its Muslim ruler made attempts to accede to Pakistan but this was rejected by the Hindu residents. In 1948 it joined India after a decision in a plebiscite. Hyderabad opted for independence initially. However, its position as a territory within India made it vulnerable. After an Indian economic blockade, and later military occupation, the territory was incorporated. Das, "The Status of Hyderabad During and After British Rule in India", A.J.I.L., Vol. 43 (1949), 57-72; Eagleton, "The Case of Hyderabad Before the Security Council", A.J.I.L., Vol. 44 (1950), 277-302.

Islamic-oriented Pakistan. Hindu massacres of the Muslims resulted in an influx of Muslim reinforcements from Rajasthan, and anti-Hindu retaliatory measures.

By July 1947 the situation had become so serious that the Maharaja of Kashmir was forced to move his government to the winter capital of Jammu. The Muslims gained control of a substantial part of Kashmir and formed what came to be called the Azad government which later became part of Pakistan. Faced with a threat of total Muslim control, the Maharaja requested Indian help to repel the Muslim invasion. India agreed to help on condition that the Maharaja accede his territory to her. In October 1947, the letters of accession were consequently signed and Kashmir came under Indian control. In accepting the accession on behalf of India, Lord Mountbatten indicated that:

in the case of any State where the issue of accession has been the subject of dispute, the question...should be decided in accordance with the wishes of the people of the State. It is my government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by reference to the people.<sup>207</sup>

The actual instruments of accession later concluded made no reference to the wishes of the people or any other condition. However, Lord Mountbatten's statements were reaffirmed by India's Prime Minister Nehru on several occasions between 1947 and 1952.

In the late 1950's political and strategic developments in the Asian region underscored the strategic significance of Kashmir. Pakistan's military strength was enhanced with its membership in the military pacts of CENTO and SEATO and increases in American military aid. Chinese military threats against India mounted with the development

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207. Lakhanpal, *op.cit.*, note 204, 57.

of the Indo-China border dispute. Kashmir became a promising military base for any potential operations against Pakistan or China. Given the territory's Muslim majority India had always faced the risk of losing the territory to Pakistan in the event of any plebiscite on the accession.<sup>208</sup> Nehru consequently rejected the idea of any popular consultations in 1956. In 1965, disagreements between India and Pakistan over Kashmir resulted in large scale war.

*Demands:* Pakistan demands the incorporation of Kashmir. It thus seeks a plebiscite in the region in the hope that the Muslim majority would vote to unite with it. A Pakistani minister once summed up the main Pakistani demand when he said "Pakistan can never be complete without self-determination in Kashmir. This is the demand of the Muslims of the subcontinent".<sup>209</sup>

The Kashmir problem remains unresolved. In 1948 India brought the issue to the attention of the Security Council which noted that the parties to the dispute desired to resolve it "through the democratic method of a free and impartial plebiscite". In August 1948 the Council again affirmed the desire of both India and Pakistan to resolve the problem through popular consultations and recommended the withdrawal of Indian and Pakistani troops.<sup>210</sup> In another resolution in 1950, the Council declared: "The question of accession of the State of Jammu and Kashmir to India will be decided through the democratic method of a free and impartial plebiscite".<sup>211</sup> India however insisted on the withdrawal of Pakistan troops as a condition for any plebiscite - a condition which

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208. The results of a plebiscite might not necessarily go against India. Potter suggests "it does appear that Kashmir...may prefer to avoid the strict Muslim state of Pakistan with its somewhat feudal economic pattern and join the new India" (Potter, *op.cit.*, note 204, 363).

209. Pakistan Times (14 July 1961), quoted in *Umozurike*, 241.

210. Minutes of the Security Council Committee Yearbook of the United Nations (1948), 281.

211. S/2017/Rev., Yearbook of the United Nations (1950).

proved unacceptable to Pakistan.

Since 1948 all attempts to mediate between the two countries on the issue have failed. After the 1965 Indo-Pakistani war, both parties entered into negotiation and concluded the Tashkent Agreement. However, the accord only took note of the problem and the parties agreed under it to withdraw their forces to their pre-1965 positions.

#### THE PALESTINIAN QUESTION

Since 1948, the Palestinian question has become a permanent feature of Middle Eastern politics and the main source of Arab-Israeli antagonism. The crux of the problem is the refusal of Israel to give up Palestinian (Arab) lands it seized and subsequently occupied beginning from 1948.<sup>212</sup>

The history of the problem however goes beyond 1948. In the pre-WWI period, the area called "Palestine" comprised the territory on the East Bank of the Jordan River (Transjordan), the West Bank, the Gaza Strip and the whole of present day Israel. "Palestine" was part of the Ottoman Empire and subsequently became a Mandated Territory following the defeat of Turkey in WWI. In the immediate post-WWI era, there was an influx of Jewish immigrants into the region following the Balfour Declaration which had promised "the establishment in Palestine of a national home for the Jewish people".<sup>213</sup>

The immigration did not affect the Transjordan which was

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212. There is an extensive literature on the Palestinian Question. Of immediate general relevance to the discussion in this section are the following: Cattán, *Palestine and International Law* (1973); *The Legal Aspects of the Arab/Israeli Conflict* (1969); Quandt, Jabber and Lesch, *The Politics of Palestinian Nationalism* (1974); Bulloch, *The Making of the War: The Middle East from 1967-1973* (1974), See also *The Origins and the Evolution of the Palestine Problem* (1978) (st/SG/SerF/1) document prepared for the General Assembly's Committee on the Exercise of the Inalienable Rights of the Palestinian People; Smith, *The Palestinians*, M.R.G. Report No.24 (1975).
213. The text of the declaration is reproduced in *Suredda*, 357; Cattán, *id.*, 11.

administered as a separate Mandate and became independent in 1946 as the State of Jordan. In the area west of the Jordan River down to the Sinai boundary with Egypt, the Jewish settlements caused considerable social problems. Palestinian Arab resentment against the wave of Jewish immigrants led to several Arab protests and a series of Arab-Jewish confrontations. In 1936, the Peel Commission investigation into the causes of the conflicts recommended that the Arab-Jewish problem could be eliminated through a partition of the region.<sup>214</sup>

In 1947 when Britain gave notice that it would withdraw from the Palestine as a Mandatory, the General Assembly announced a partition plan for the territory. The West Bank, the Gaza Strip, and the area north-west of the Sea of Galilee up to the Lebanese border was to be Arab Palestine. Jewish Palestine was to comprise the rest of the territory down to the Sinai frontier.<sup>215</sup>

The partition purported to give 57% of the total area of the territory to Jews and became obviously objectionable to the Palestinian Arabs.<sup>216</sup> Jews however accepted it and proclaimed the State of Israel on 14th May 1948, the day before the British Mandate terminated.

#### The Occupation of Arab Lands

The proclamation of the Israeli State marked the beginning of the first Arab-Israeli war. After an abortive co-ordinated military assault on Israel by Arab States (Jordan, Egypt and Syria), Israel overran Arab Palestine, leading to a forced exodus of the Palestinians who took refuge in other Arab states. Israel proceeded to occupy

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214. Report of the Royal Commission (Peel Commission Report), British Command Papers (June 22, 1937), 5479.

215. G.A. Res. 181 (II)(1947), Part II.

216. Cattan, *op.cit.*, note 212, 54-55. Cattan takes the view that the Partition Plan was inequitable. See also Bassiouni, "Self-Determination and the Palestinians", P.A.S.I.L., Vol.65 (1971), 31-40 at 35-37.

those territories.<sup>217</sup> Even though an Armistice Agreement was signed between the Arab States and Israel in 1949, the latter did not give up the Palestinian lands.

The Israeli occupation of the seized territories thereafter became the crux of the Arab-Israeli conflict. In 1967 a brief but large scale war broke out in the region with Israel seizing more Palestinian (Arab) territories and a part of the Egyptian Sinai. Israel returned the Sinai territory to Egypt in 1979 as a result of the Camp David Peace Agreement. However, the Arab Palestinian lands still remain under Israeli occupation.

Démands: The Palestinian Arabs under the banner of Palestinian Liberation Organization (P.L.O.) demand a return of Palestinian lands and the creation of an independent Palestinian State. In earlier times, these demands were formulated as part of more radical goals which included a promise to drive the Jews into the sea and the total liquidation of the State of Israel.

The international recognition of the P.L.O. and the desire to ensure a good measure of international relations and respectability has forced the Arabs to modify their demands into acceptable and realistic dimensions. There were hints of a possible *quid pro quo* in which the Palestinians would recognize a Jewish State of Israel in return for Israeli recognition of a Palestinian State on the West Bank and the Gaza. The P.L.O. later dissociated itself from the plan.<sup>218</sup> The Palestinians

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217. There is a controversy as to the factors that induced the mass exodus of the Palestinians. The Israelis argue that the Arabs left because the "invading Arab armies told them to, both for propaganda reasons and because they wanted no friendly non-combatants cluttering up the battlefields when they counter-attacked to drive the Zionists into the sea". They explain further that in the town of Hiafa, the Arabs specifically requested for British escort to leave the town even though there was no threat of force of any kind. The Palestinian Arabs on the other hand argue that the Jews used brute force - both psychological and physical to drive them out (see Smith, *op.cit.*, note 212, 101-103).

218. Smith, *id.*, 7-8.

today desire the establishment of a homeland on the basis of the 1947 partition. In pursuance of this, they demand the withdrawal of Israel from all the Palestinian territories it occupies. Palestinian demands were aptly summed up in the words of one Palestinian nationalist:

For the Palestinians, the primary legal right is the right to live on their land..., our self-determination means living on our lands. And this is in contradiction with the expansionist goals of Israel. Self-determination for our people is related, part and parcel with the democratic Palestinian state...The only thing possible to argue upon is the right of the Palestinian people to build a new state, free from Zionist and imperialist control (a democratic state of Palestine). This is the right we aspire to and we are not going to stop fighting before we achieve it. <sup>219</sup>

The Palestinian Question is still unresolved despite numerous international efforts at mediation. The General Assembly has affirmed the rights of the Palestinians to self-determination and the return of their homeland and condemned the Israeli treatment of the problem. <sup>220</sup>

But the Security Council has also affirmed the right of all states in the Middle East to live in peace within secure and recognized boundaries free from threats or acts of force. <sup>221</sup> By implication the Council recognizes the right of Israel to exist as a state in the region and the rights of the Palestinians to their territories. From the Israeli point of view however, the two positions appear irreconcilable. Israel claims the occupied territories on the basis of the

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219. Quoted in Smith, *op.cit.*, note 212. Bassiouni offers an alternative view on the Palestinian demands: "What is claimed by the Palestinians is not a right of 'self-determination' arising only in the present or after their displacement in 1948 from Palestine but a right which existed at the time the mandate was established and never terminated. The main tenet of this position is that...legitimate rights such as self-determination are never extinguishable by coercive displacement (or preventing the return) of the people from territory after the right has accrued to this very people on the very territory, (P.A.S.I.L.) (1971), 38.

220. See for instance G.A. Res 2672 (XXV) also Resolutions 2649 and 2793-D (XXVI).

221. S.C. Res. 242.

allegation that it wishes to ensure its security against the bellicose Arabs who have vowed to push the Jews into the sea. Thus as far as it is concerned its "secure" boundaries within the context of the General Assembly resolution must necessarily include the buffer occupied zones that comprise the Arab lands. It has also indicated that its annexation of Jerusalem is "irreversible" and "not negotiable".<sup>222</sup>

Apart from other problems related to the creation of a Palestinian independent state,<sup>223</sup> the inflexible Israeli position and its concept of national security needs render a solution to the Palestinian Question very difficult.

#### General Remarks

By their very nature, separatist demands founded on territorial claims have international dimensions which necessitate the search for international, regional or global solutions. Political, and most of all, strategic considerations play a significant role in these conflicts. This is underscored by intervention of state third party claimants who seek advantages. The rejection of separatism in these cases is therefore not just a refusal to settle an internal issue with the beneficiary group in the parent state. The repudiation is usually a strategic or political defensive action against the state third party. It is a function of definite strategic interests or threats.

Given the opposing interests of the parent states and claimant states, it is hardly surprising that in this category none of the cases has ever been resolved successfully. It will be suggested at this stage that the prospects for any solutions in such conflicts lie in

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222. Cattani, *op.cit.*, note 212, 161.

223. For a discussion of some of the practical problems related to the establishment of an independent Palestinian State, see Collins, "Self-Determination in International Law: The Palestinians", *Case W. Res.Journ. Int'l.L.*, Vol. 12 (1980), 137-167, 163-165.



the isolation of the self-determination interests of the beneficiary groups from the strategic needs and interests of the contesting states. This point will be discussed in more detail in later chapters of this work.<sup>224</sup>

ABSENCE OF CONSENT FOR ORIGINAL ASSOCIATION OR SOME OTHER FORM OF ILLEGALITY

In this category we include two types of cases, viz.:

(i) those based on claims that the original association with the parent state was not preceded by free consent, and (ii) claims that the conduct of the parent state has breached the terms of association and thus invalidated the bases of relationship between the claimant group and the state.

As indicated earlier, integration as a form of self-determination exercise is only valid if preceded by freely expressed consent properly ascertained.<sup>225</sup> Thus by basing their claims on the absence of free consent, claimants imply that they have not exercised a valid act of self-determination. Such cases usually involve former colonies which were integrated into other states without the formal processes of consultations prescribed under Resolution 1541 (XV). The Claimants consequently regard themselves a colonial peoples. Examples of such cases are East Timor and Western Sahara. The Baltic States also base their claims to self-determination on the absence of free consent. However, the historical background of their claim is totally different from those of the former colonies. In the case of type (ii) claims Eritrea is a leading example. Events in Tibet would also bring it into this category.<sup>226</sup>

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224. Page 327, *infra*.

225. Page 63, *supra*.

226. See text accompanying notes 70-72, *supra*.

## EAST TIMOR

In Chapter Three it was indicated that East Timor was incorporated into Indonesia in 1975, and that for all practical purposes East Timor is now Indonesian territory.<sup>227</sup> However, the FRETELIN is still active in parts of the territory and occasionally engages in armed combat with Indonesian troops. It demands secession from Indonesia. Alternatively, it claims that the incorporation of East Timor was illegal and consequently demands international supervised consultations among Timorese on their political future.

Indonesian efforts to suppress the FRETELIN have been very harsh and have attracted international criticism for human rights violations.<sup>228</sup> Apart from such criticisms, international support for East Timor has been restricted to General Assembly's annual resolutions.

## WESTERN SAHARA

Moroccan attempts to incorporate Western Sahara led to a fierce armed resistance by the POLISARIO.<sup>229</sup> Unlike the East Timor situation, the incorporation has hardly been successful. Despite the Moroccan purported annexation, the OAU has recognised Western Sahara's right to self-determination. The Organization has since admitted the Western Sahara as its 51st member under the name of Saharan Arab Democratic Republic (SADR).<sup>230</sup> Its admission has created serious tensions between Morocco and her allies on the one hand and other members of the Organization on the other, and threatens to break up the OAU.<sup>231</sup>

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227. Page 81, *supra*.

228. On Indonesia's human rights record in East Timor see the following: "East Timor Refugees Tell of Mass Executions", *The Guardian* (12 Jan. 1982); "Indonesia Starves out East Timor". *The Australian* (3 Oct. 1981); Kohen and Taylor, *An Act of Genocide: Indonesia's Invasion of East Timor* (1979); Suter, *East Timor and West Irian*, M.R.G. Report No. 42 (1982), 17-18.

229. POLISARIO is the guerrilla movement for the independence of Western Sahara.

230. *African Research Bulletin*, Vol. 19, No. 2 (March 1982), 6335.

231. See the detailed report on the possible implications of the  
(contd)

## THE BALTIC STATES

The Baltic States comprise Estonia, Latvia and Lithuania. All three are states of the U.S.S.R. Their nationalists argue that the incorporation of the states into the Soviet Union was illegal because it was not based on their free consent. A brief historical account would explain their position.<sup>232</sup>

### Early Relations with Russia

During the expansionist rivalry between Russia and Prussia in the sixteenth and seventeenth centuries, Russia annexed Estonia, Latvia, Lithuania and Finland. In WWI, it ceded all the four territories to Germany under the Brest-Litovsk Treaty. However, with the Allied victory in 1918, the Treaty was cancelled and all four states emerged as sovereign nations. They remained independent until the outbreak of WWII.<sup>233</sup>

On the eve of the War, Germany and the Soviet Union signed what came to be called the Hitler-Stalin Pact.<sup>234</sup> It is believed that the secret protocols to the accord divided Eastern Middle Europe into two spheres of influence and that the Baltic States came within the Soviet

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231. (contd) admission of the OAU in *id.*, 6353-6362. The 19th Annual Summit of the OAU scheduled for Tripoli in 1982 ended in a fiasco because of the admission of the SADR. Out of the organization's 50 members, 27 recognised the SADR and attended the Summit. 19 pro-Moroccan states boycotted it. The organization could not raise the required 34 states for a quorum. In June 1983, the SADR voluntarily withdrew from the OAU Summit in Addis Ababa convened to bring the pro-Moroccan and pro-SADR forces together in the organization.

232. For a background to the Baltic problem see generally *The Baltic States and the Soviet Union*, Report of the Council of Europe on Problems of the Baltic I, Stockholm (1962); Tarulis, *Soviet Policy Toward the Baltic States 1918-1922* (1965), particularly Chapters 3 and 4; Karass and Spruds (eds), *The Baltic States: A Study of their Origins and National Development, Their Seizure and Incorporation into the USSR*, International Military Law and History Report Series, Vol. IV (1972); Laserson, "The Recognition of Latvia", A.J.I.L. (1943), Vol. 37, 233-247.

233. Newman, *The Baltic Background* (1948), 11-36, particularly at 18.

234. This accord is sometimes referred to as the Molotov-Ribbentrop Agreement.

sphere.<sup>235</sup> In pursuance of the secret agreements, the Soviets concluded Pacts of Mutual Agreement with the States of Latvia, Estonia and Lithuania in early 1940. The new accords gave the Soviet Union substantial military concessions in each state. In return, the Soviets undertook not to interfere in the internal affairs of the Baltic States. Soviet Minister Molotov emphasized this:

The Pacts...in no way imply the intrusion of the Soviet Union in the internal affairs of Estonia, Latvia and Lithuania...(the) foolish prattle of Sovietization of the Baltics is of use merely to our common enemies. <sup>236</sup>

Stalin also promised that after the war, Soviet troops would be withdrawn from the three states.<sup>237</sup>

#### Incorporation into the Soviet Union

In the summer of 1940, with the Germans advancing into Western Europe the Soviet Union changed its position on the Baltics. In a dispatch to the three states it declared:

in view of the anti-Soviet policy of the governments of the Baltic States, the U.S.S.R. (is) compelled to demand from all three States, the formation of such governments as would be capable and willing to ensure that the Pacts of Mutual Assistance would be loyally carried out. <sup>238</sup>

In response to this all the political parties in the three states were dissolved and new ones formed under communist control.<sup>239</sup> In the general elections that followed the voting was open for all adults but the voters had no choice of candidates. Thus in the three states, communist-controlled parties assumed power by July 1940.<sup>240</sup>

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235. Meissner, "The Right of Self-Determination after Helsinki and its Significance for the Baltic Nations", Case W.Res.Journ.Int'l. L., Vol. 13 (1981), 375-384 at 379; Dunn, *Cultural Processes in the Baltic Area under Soviet Rule*. Research Series No.11, Institute of International Studies (1966), 17.

236. Newman, *op.cit.* note 233, 160-161.

237. *Id.*, 161. 238. *Id.*, 162.

239. In Lithuania the "Labour Allienace" was formed. Estonia formed the "Alliance of Working Peoples" while Latvia also inaugurated the "Labouring People of Latvia" (*id.*, 162-164).

240. In Lithuania the party was returned by 99.90% 'yes' votes.

A week after the elections it was reported that,

the representative assemblies elected by universal suffrage, established Soviet governments in the three Baltic States, met and decided on the entry of these States into the Union of Soviet Socialist Republics.<sup>241</sup>

The incorporation of the Baltic States into the U.S.S.R. was achieved quite easily under a facade of legitimacy.

When Germany overran the Baltics in WWII, Russian forces were pushed out of the area. Before the German occupation of the region, the Lithuanians even proclaimed a Provisional Government of the Independent Republic of Lithuania. In 1944 however, Russia halted the German advance and drove them out of the Baltics. The Baltic States were thus "liberated" and brought back under Soviet control.

Demands: The general claim of Baltic Nationalism is summed up by Boris Meissner when he says: "the incorporation of the Baltic States into the Soviet political alliance...did not constitute a voluntary union based on federal principles, but rather a forcible acquisition forbidden in modern international law".<sup>242</sup> On the basis of this illegality the Baltic States demand the right to self-determination as expressed through a return to their pre-1940 independence status. Their demands are basically secessionist.

Baltic nationalist demands are not tolerated in the U.S.S.R., so Baltic nationalism is most active outside the Soviet Union. Inside the U.S.S.R. it is doubtful whether the Soviet authorities regard the Baltic question as a serious problem. As indicated, Western support for the Baltic States led to the inclusion of self-determination in the Helsinki Accords.<sup>243</sup> It is believed that this was meant to help the

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240. (contd) Estonia returned the Working Peoples Party by 93% 'yes' votes and Estonia's party was also returned by 97% 'yes' votes.

241. *Id.*, 164.

242. Meissner, *op.cit.*, 235, 381.

243. Pages 129-130, *supra*.

"oppressed" peoples of the Baltic.<sup>244</sup> Whatever the hopes and motivations behind the Helsinki Accord, the latter has not been of any real help to the Baltics. For all practical purposes they remain integral parts of the U.S.S.R.

#### ERITREA

As indicated in Chapter Three, Eritrea was granted internal self-determination and made part of the federation of Ethiopia in 1952. In 1962 the Eritrean Assembly abolished Eritrean federal status and it became fully integrated with Ethiopia.<sup>245</sup> Today, Eritrea nationalists are engaged in an active war of secession.

Demands: Eritreans argue that they did not consent to the 1952 federation agreement with Ethiopia, and that even if they later consented by conduct, i.e. by becoming part of the federation, Ethiopia breached the terms of the association by inducing the abolition of the federation. They also maintain that the Eritrean Assembly had no legal authority to abolish Eritrea's federal autonomous status in favour of integration, without the express consent of the Eritrean people procured under United Nations' supervision. Alternatively, it is argued that the Eritrean Assembly acted under duress and therefore its purported abolition was of no legal validity.<sup>246</sup>

Admittedly, Eritrea exercised its right of self-determination by accepting federation with Ethiopia. However, Eritreans argue

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244. But see Korbonski, "The Helsinki Agreement and Self-Determination", *Strategic Rev.*, Vol. 4 (1976), 48-58.

245. Page 100, *supra*.

246. The arguments of Eritrea are discussed in a work by the Eritrean Association of North American Students (EASNA), *In Defence of the Eritrean Revolution* (2nd edn) (1978). For a treatment of the situation in Eritrea in more recent times, (i.e. as of 1982), see *The Guardian* (17 Feb. 1982); *Economist* (30 January 1982). See also Healy, "The Principle of Self-Determination, Still Alive and Well", *Millennium*, Vol. 10 (Spring 1981), 14-28.

that the right of self-determination is continuous and that the breaches by Ethiopia and the general accumulation of illegalities associated with the relationship necessitate a revival of their right. They demand secession.

For over two decades the Eritrean nationalists under the leadership of the Eritrean Popular Liberation Front and other related liberation movements in the territory have been engaged in a secessionist struggle against Ethiopia. Despite the increasingly high costs in terms of human and material resources on both sides, neither Ethiopia nor Eritrea seems to be winning the war. There has been considerable Soviet and Cuban intervention on the side of Ethiopia,<sup>247</sup> but it has not helped to induce any definite solutions. The Eritrean demand for secession and the related guerrilla war continues today.

#### General Remarks

Separatism in this category seeks to reject the fundamental legal basis of a group's relationship with the parent state. Consequently, the demands made cannot be met through a simple remedial rearrangement within the same body politic no matter how generous the remedial concessions might be. The cases of East Timor and Western Sahara suggest that forced annexations of former colonies would normally attract international disapproval and sympathy for the annexed territory. One, however, notices that in the case of East Timor, the international support is fairly constrained. This could be explained by the general unwillingness of states to intervene in separatist conflicts particularly when they involve a regional power or a strategic ally. Similar reasons could explain the cautious attitude of Western States towards the Soviet Union's treatment of the Baltic nations.

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247. By April 1978 there were between 5,000-10,000 Soviet Cuban troops involved in the conflict. (The New Internationalist, No. 62, April 1978, 8). See also Healy, cited, note 246, *supra*.

## CONCLUSION

In this chapter, attention has been devoted to the question as to who demands self-determination in the post-colonial context, what specific demands are made and why. A survey of the claim categories indicates that claimants comprise ethnic, linguistic or religious minorities, nationalities (e.g. Croatsians), racially disadvantaged groups (e.g. Black Americans and the Blacks of South Africa), displaced peoples (Palestinians) and distinct territorial communities. The motives, aspirations and the general internal dynamics of each claimant organization vary. Nevertheless, the organizations share common trends in their attitudes towards self-determination that make room for some generalizations.

In all instances, a claim to post-colonial self-determination is a manifestation of the claimant's assertion of its separate identity and an implied or express demand for exclusive control over issues that relate to that identity. The claim is in itself the product of a sense of unsatisfied aspirations, a sense of insecurity or a deprivation shared by the members of the claimant community. To the claimant, the recognition of a separate identity with the attendant privilege of exclusive authority over its affairs is a means of safeguarding its values and advancing its interests. Post-colonial self-determination claims are not restricted to any one continent or ideological block. They are a global phenomenon that plague different varieties of states.

Claimant groups vary in the intensity of their demands which range from autonomy to semi-sovereign status to outright independence. The exact form of demands made depends on the nature of the deprivations, the claimant's expectation of benefits, the resources (internal or external) to back its position, and its sense of internal cohesion needed to sustain a common front behind the claim. With the exception of a



few cases, all claimants demand autonomy in one form or another as opposed to secession in the initial stages of their claim. As demonstrated in the cases of Bangladesh and Biafra, secession becomes appealing, but as a last resort when negotiations for a semi-sovereign or autonomous status have failed.

On the other hand, some claimants pursue only autonomy or devolution with no intentions of secession (e.g. the Catalans of Spain). Such groups focus on increased decentralization to ensure exclusive regional control without necessarily losing the benefits of belonging to the larger community. They are more subtle and sophisticated in their demands. They seek a complex formula for state integration that permits the redistribution of national wealth and power within a framework that entails minimum interference and maximum assistance from the central authority.

In the few exceptions where secession is demanded from the onset (e.g. as in Katanga, the Ogaden, Eritrea and Tibet), the very nature of the grievances that necessitate the claims render any other solution impossible.

Whatever the form of a claim, the claimants have to contend with the responses of their parent states. As a rule, claims for autonomy are considered favourably to the extent that they only involve internal structural changes in the state. On the other hand, claims for secession for whatever reason attract definite negative responses and coercive actions from the parent states. International responses to specific claims vary. Claims for autonomy confined to the internal politics of the parent states are usually divorced from any international intervention and considered as domestic issues. However, secessionist claims, with the attendant coercive responses of the parent states, attract considerable external intervention or reactions. In

formulating prescriptions on post-colonial self-determination our main concern is with that regime of claims that attract international responses and consequently necessitate appropriate international regulations.

## CHAPTER SEVEN

### PRESCRIPTIONS ON POST-COLONIAL

#### SELF-DETERMINATION

##### 1. CRITIQUE OF A PROPOSED SCHEME FOR ADMITTING CLAIMS

A number of authors have taken up the task of formulating proposals to deal with separatist claims. Some recommend that each claim must be assessed within a set of guidelines based on selected objective criteria.<sup>1</sup> Others call for a more comprehensive formula. They maintain the legitimacy of claims ought to be determined within a broader framework of community policy goals. To such authors, the legitimacy of, and support for a claim must depend on whether it is consistent with a given community policy. They, therefore, identify definite community policies and propose attendant schemes within which the legitimacy of each claim may be determined. One such author is L.C. Buchheit.<sup>2</sup> In what follows, it is proposed to review his work: *Secession: The Legitimacy of Self-Determination*, with specific reference to his recommended scheme for resolving separatist claims.

Buchheit's work is by no means exhaustive of the formulations

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1. See for instance Nanda, "Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect", *Houston Journ. Int'l.L.* (1978), 719; Nayar, "Self-Determination, The Bangladesh Experience", *Revue des Droits de L'homme*, Vol. 7 (1974), 258. "The Logic of Secession", *Yale Law Journ.*, Vol. 89 (1979-80), 823; Kaur, "Self-Determination in International Law", *I.J.I.L.*, Vol.10 (1970), 479; Greenspan, "Human Rights in Territories Occupied by Israel", *Santa Clara L.Rev.*, Vol. 12, 395; East Pakistan Staff Study, "The Right of Self-Determination in International Law", *Int'l.Commission Jurists Rev.*, Vol. 8, 47; White, "Self-Determination: Time for a Re-assessment", *Int'l. Law Rev.*, Vol. 28 (1981), 147.
  2. Suzuki, "Self-Determination and World Public Order", *Va.Journ. Int'l.L.*, Vol. 16 (1975-76); Lung-Chu Chen, "Self-Determination as a Human Right", in Reisman and Weston (eds), *Towards World Order and Human Dignity* (1976), 198-261; Moore, "The Control of Foreign Intervention in International Conflicts", *Va.Journ.Int'l. L.*, Vol.9 (1968-69), 209.

on the subject. It has however been chosen because it is a major work devoted exclusively to the development of a comprehensive scheme for dealing with post-colonial self-determination claims. The choice notwithstanding, references will be made to other works whenever appropriate.

### Buchheit's Approach and Policy Basis

Buchheit identifies a fundamental policy goal which he uses as the pivot for the development of his scheme. Basing himself on the acceptance of the principles of the United Nations Charter by states, he suggests that the basic world community policy is one founded on a principle of "maximization of international harmony coupled with a minimization of individual human suffering".<sup>3</sup> He explains that "this principle amounts to a doctrine of non-interference in the internal affairs of a State, unless, by its treatment of its own subjects, the State transgresses a collective sense of the minimum requirements of human dignity and social order".<sup>4</sup> He argues further that in dealing with post-colonial self-determination claims, "the institution of the existing state [should] be respected, unless to do so would contribute to more international disharmony than would result from legitimizing the separation of a component group".<sup>5</sup> In other words, a claim may be

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3. *Secession*, 227.

4. *Ibid.*

5. Lung Chu-Chen adopts a different approach. He suggests that in considering a claim, the "critical test" is "to evaluate the aggregate value consequences for all those communities, potential as well as existing in honouring or rejecting the claim and to honour the option that will promote the largest net aggregate of common interests by fully estimating the relative costs and benefits for each of those communities" (*op.cit.*, note 2, 214). He defines the 'net cost' in terms of the viability potential of the claimant group and in terms of the adverse impacts on the parent state. He favours the promotion of human dignity as the policy basis of his test. (*id.*, 213). Similarly, Suzuki maintains that "the demand for separation may be permissible if it purports to maximize all the values of all groups" and that such a demand is valid if it is consistent with "basic community policies", which are the promotion of "enjoyment of all human rights" (*op.cit.*, note 2, 862, 861).

admissible if the future consequences of such admission are outweighed by the current disruptive consequences of rejecting it.<sup>6</sup>

### The Internal Merits of a Claim

Buchheit explains that a claim to self-determination is either remedial or parochial. It is remedial where the right is sought to resolve a quantum of oppression. A claim is parochial where it is premised solely on the existence of a distinguishable self opposing alien rule for the sake of it.<sup>7</sup> In his view, either type of claim, taken on its own, is "linear" and unsuitable as a basis for assessing the legitimacy of a claim.<sup>8</sup> However both types could be present in each claim and may provide what he describes as "the internal merits of a claim".<sup>9</sup> (We will refer to this simply as "Internal Merits" in the rest of the work.) In other words, in Buchheit's scheme, the Internal Merits are the sum total or a combination of all the facts and reasons that can be advanced by a group in support of its demand for separation. The Internal Merits therefore include such elements as persecution of a group by the state, distinctive selfhood, capability of independent existence, the prospects of the group's viability as a cohesive entity and evidence of its confinement to a definite territorial base.<sup>10</sup>

The Internal Merits can be graded as excellent, fair or poor depending on the combination of all the foregoing elements.<sup>11</sup> They are excellent where, as in the instance of Bangladesh, a distinctive group, occupying a definite territorial area and capable of existence as a cohesive independent polity, suffers persecution at the hands of

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6. *Ibid.*

7. *Secession*, 220-224, 228.

8. *Id.*, 224-225.

9. *Id.*, 228-231.

10. *Ibid.*

11. *Id.*, 249.

its parent state. Conversely, they are poor where there is no evidence of persecution, or even if there is, the group does not demonstrate any evidence of future cohesiveness or capability of independent existence, or any of the vital elements such as a distinct territorial base or selfhood.

### The Disruptive Factor

According to Buchheit, the Internal Merits must be balanced with the "Disruption Factor" in assessing the legitimacy of a claim.<sup>12</sup> The Disruptive Factor is the balance between the *current disruption* resulting from not allowing a claim on the one hand, and the *future disruptive consequences* of honouring such a claim on the other hand.<sup>13</sup> The result, i.e. the Disruption Factor for each claim could be one of three cases:

1. Where it is high, i.e. the future danger (in) honouring the demand outweighs the risk of maintaining the *status quo*.
2. Where it is even, i.e. neither of the alternatives is likely to produce any significant disruption.
3. Where it is low. In this case, the risk of future disruption is minimal, but there is a degree of current disruption. Alternatively, the risk of future disruption, though substantial is outweighed by a significant degree of current disruption.<sup>14</sup>

### The Calculation of Legitimacy

In Buchheit's scheme, where Disruption Factor is high, "the claimant must make out an extraordinarily good case for its entitlement to self-determination...(and), the more will be required by way of demonstrating selfness and future viability".<sup>15</sup> On the other hand, where the Disruption Factor is low, "the community can afford to be

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12. *Id.*, 238-241.

13. *Id.*, 231-238.

14. *Id.*, 239.

15. *Id.*, 241.

less strict in its requirements for selfhood".<sup>16</sup> In other words, where the Disruption Factor is high, the Internal Merits must be excellent for a claim to be legitimate; where it is low, a claim could be legitimate even though the claimant demonstrates evidence of a poor Internal Merits.

#### General Remarks

Buchheit's scheme represents a thoughtful effort.<sup>17</sup> However, it is too theoretical and state-centred and of doubtful value in the practical resolution of post-colonial self-determination claims.

The notion of the Disruption Factor advanced in the scheme has two temporal elements - present and future. The former relates to the current disruption that occurs as a result of a claim. The latter concerns the future disruptive consequences of accepting or rejecting a claim. Buchheit admits that the current disruption arises because there is an open-ended subjectivity involved in the unilateral determination of "legitimacy" of claims.<sup>18</sup> This is in turn due to the absence of any positive norms or formulations on post-colonial self-determination claims.<sup>19</sup> If there were such norms, their function would be to minimise if not remove

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16. *Ibid.*

17. For other comments and reviews of Buchheit's work see "The Logic of Secession", *op.cit.*, note 1, 807; Suzuki, "Self-Determination in International Law", *Yale Law Journ.*, Vol. 89 (1980), 1247; Highet, *A.J.I.L.*, Vol. 74 (1981), 1010.

18. *Id.*, 42.

19. He explains that "at the present times, there is neither an international consensus regarding the status of secession... nor is there an accepted teaching regarding the nature of a legitimate secessionist movement...[By] its present inability to distinguish legitimate from illegitimate claims...the international community is handicapped in its attempts to minimize instances of unwarranted third party interventions in secessionist conflicts" (*id.*, 216).

completely the incidence of current disruptions that accompany claims. Despite his correct assessment of this state of affairs, Buchheit fails to address himself to the formulation of any prescriptions with the aim of reducing or removing such current disruptions. He rather concentrates his efforts on a scheme which relies on the disruptions to be operational.

By establishing a relationship between legitimacy and the degree of disharmony, Buchheit ends up measuring the value of each claim by the yardstick of disruption. As one author notes:

under...Buchheit's test, a claim to secession may rank ...only poor on its internal merits, but because it occurs in a territory whose fragmentation is unlikely to cause international repercussions, it will be determined a legitimate claim. On the other hand, a claim to secession which ranks highly on its internal merits may well be deemed outside the area of legitimacy because of the disruption that will be caused by such a claim.<sup>20</sup>

On this basis, Buchheit's policy of "minimization of individual human suffering" can hardly be reconciled with his method of calculating legitimacy. In empirical terms, the scheme would imply that in a Bangladesh or Biafran type of situation, a claim must not be honoured if it can be proved that the Disruptive Factor would be high. The scheme would further reject the claims of East Timor, Eritrea and Western Sahara to self-determination, if the incorporating states can prove that the separation of the territories could lead to some forms of disruption which rank high in the test proposed by Buchheit. It is submitted that the scheme, to this extent, lacks both the moral basis and the legal justification to make it acceptable. As a mechanism for resolving self-determination conflicts, it is too state-centred and seriously undercuts the role of self-determination as a human right.

The scheme is limited to prescriptions that become operational

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20. White, *op.cit.*, note 1, *supra*, 161.



after claims have been made. As Suzuki points out, "this *ex post facto* response excludes alternative strategies for rectifying the predispositional and environmental conditions that may account for recurring, intense claims for self-determination".<sup>21</sup> The scheme is therefore neither preventive nor remedial. It is principally a means of predicting the success of claims rather than a formula for determining the legitimacy of claims on the basis of accepted norms.

We have indicated earlier that the future element of Buchheit's Disruptive Factor relates to the future disruptive consequences of accepting or rejecting a claim. It is submitted that however one construes the actual content or nature of such disruptions, they do not lend themselves to mathematical calculations. At best they can only be based on conjecture and a subjective theoretical analysis.<sup>22</sup> In practical terms, it is difficult if not impossible to give an accurate prediction of the extent of future disruptions. In any case they cannot be quantified for the purposes of drawing the balance in Buchheit's scheme.

It has also been indicated that the Internal Merits of a claim includes evidence of persecution, selfness, a territorial base, viability and capability for independent existence. Buchheit's scheme assumes that these elements are all essential to a claim and that they can be ascertained by some method of prediction. The validity of these assumptions would be discussed elsewhere in this work.<sup>23</sup> At this stage, it is sufficient to note that some of the elements may be empirically verifiable. However, viability, capability for independent existence and cohesion are basically future oriented. Since it is impossible to

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21. Suzuki, *op.cit.*, note 2, 1259.

22. Buchheit himself admits this. He regards his scheme only as a "basis for argument" and not "a mathematical precise art"(p.240).

23. Page 349, *infra*.

subject them to actual quantification, they cannot be practically verified and be used for any meaningful predictions. They are therefore of little practical value in a futuristic scheme such as Buchheit's.

## 2. OUR PRESCRIPTIONS ON POST-COLONIAL SELF-DETERMINATION

### Identification of Goals and Policy Prescriptions

In formulating prescriptions for any purpose, it is appropriate to identify in certain terms the desirable community goals for which the formulations are made. This is necessary because the scope of any prescription is partly a function of the dimensions of the desired goals. The identification of the latter also helps to provide a clarity of purpose for the formulator and ensures a better understanding of his recommendations.

Within the post-colonial context, self-determination could be applicable in relation to two basic goals:

1. The protection and promotion of human rights.
2. The peaceful resolution of certain types of territorial disputes.

On the basis of these goals, one may recommend a community policy on the subject. But before we do so, it must be emphasized that, on their own, these two goals are not sufficient parameters for the determination of a community policy on post-colonial self-determination. They must, as of necessity, be considered along with other equally important community goals to provide a sound policy basis. In the light of this, it is recommended that subject to a set of substantive conditions and procedural criteria, a claim ought to be admitted if it is consistent with the stipulated community goals. The substantive conditions embrace conformity with or cognizance of such goals as world order, stability, etc.<sup>24</sup>

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24. See Chapter 8, *infra*.

### The Protection and Promotion of Human Rights

The adoption of a human rights oriented policy is considered desirable for a number of reasons. Firstly, one of the fundamental aims of international organization is the defence of the dignity and the rights of the human person.<sup>25</sup> A human rights oriented approach in the formulation of international prescriptions is thus consistent with the contemporary demands of the world community. As U Thant once noted:

A gradual development is taking place within the United Nations of a common philosophy regarding the right of every individual, without distinction as to race, sex, language or religion, to secure respect for his dignity as a human being whether in the political and civil, or the economic, social and cultural fields.<sup>26</sup>

Similarly, McDougal, Lasswell and Chen maintain that an important development in the international process is that people, the world over, irrespective of differences in culture and style of justification, are increasingly demanding the enhanced protection of all basic rights.<sup>27</sup> McDougal takes this point further and suggests that a "value by value breakdown of the demands and expectations of peoples would...reveal

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25. Moskowitz, *The Politics and Dynamics of Human Rights* (1968), 82-83. In support of this view, Moskowitz cites the submissions of delegates at the San Francisco Conference in the formative years of the U.N. He also suggests that the human rights orientation in contemporary times has been necessitated by the gross violations of the Hitler era and the need to prevent similar violations in future. Henkin also notes that "in our time, human rights have become a principal activity of international government and non-governmental organizations" and that "human rights have figured prominently in relations between nations and have been the grist for other transnational mills" (*The Rights of Man Today*, (1978), 89); On the national level, it has been suggested that the purpose of legitimate political organization is to secure and protect for each human being as much health and freedom as is compatible with equal health and freedom for other human beings. (Bay, "Universal Human Rights Priorities: Towards a Rational Order" in Nelson and Green (eds), *Universal Human Rights: Contemporary Issues* (1980), 6).
  26. Cited by Marc Schreiber in Eide and Schou (eds), *International Protection of Human Rights* (Proceedings of the Seventh Nobel Symposium) (1967), 268.
  27. McDougal, Lasswell and Chen, *Human Rights and World Public Order* (1980), 5-6.

strong trends toward an increasing consensus on the basic components of an international bill of rights".<sup>28</sup> Whatever cynicism one may have "towards a value by value breakdown" of peoples' demands, it may be hard to dispute the fact that it is desirable to fashion rules of international conduct that are based on a conception of a world in which the rights of man and his dignity are considered paramount.

The actual content of human rights demanded by peoples may vary according to societal values.<sup>29</sup> Nevertheless the concept of human rights as such is universal.<sup>30</sup> This makes the goal of human rights an appropriate basis for a policy on post-colonial self-determination because it is one area in which one is most likely to find the element of consensus. The need for a human rights oriented policy is further supported by the fact that the evolution of self-determination tends to show a logical relationship between the principle and the protection of human rights.<sup>31</sup> The protection of human rights calls for an individualistic concept; claims for self-determination on the other hand

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28. McDougal, "Human Rights and World Public Order", Va.Journ.Int'l. Law, Vol. 14 (1974), 387, at 398.

29. Henkin, *op.cit.*, note 25, 31. Cranston, *What are Human Rights?* (1973), 81-83; Nickel, "The Human Rights' Movement and the Challenge of Diversity" in Nelson and Green (eds), *op.cit.*, note 25, 43, particularly 44-46.

30. On the universality of human rights see Bay, *op.cit.*, note 25, 5. Bystricky, "The Universality of Human Rights in a World of Conflicting Ideologies" in Eide and Schou, *op.cit.*, note 26, 83-93. It has also been noted that in contemporary times "a global consciousness has emerged that is the central identity of the universal character of the campaign for human rights. It is multi-cultural, non-national, and even cuts across class lines". (Shepherd Jr., "Transnational Development of Human Rights: The Third World Crucible", in Nanda, Scarritt and Shepherd Jr. (eds), *Global Human Rights Public Policies, Comparative Measures and NGO Strategies* (1981), 213 at 215.) The general belief in the universality of human rights is supported by the formal expressions on human rights, the International Covenants on Human Rights and the bill of rights or constitutional guarantees of States.

31. Page 196, *supra*.

presuppose a collectivity. Nevertheless the two phenomena are reconcilable. Self-determination claims are aggregate demands of the individual persons that constitute the claimant group. So in the final analysis, such claims represent the demands of the aggrieved persons in the community in their individuality and in concert with each other.<sup>32</sup> The inclusion of self-determination in the Human Rights Covenants supports this view.

By adopting a human rights-oriented policy, the principle of self-determination could play the role of a sanctioning institution to help promote and protect basic human rights in the post-colonial era. In other words, self-determination would operate as a remedial right which accrues to a group only upon violation of its basic human rights.

#### The Difficulties of a Human Rights Oriented Policy

The modern concept of human rights is broad and complicated. It includes such basic elements as the right to life, it also embraces more general rights like the right to free association and freedom of movement. Such rights are usually described as social, economic, civil or political. The question is, should the violation of every

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32. Fawcett notes: "now it is of course possible to speak of self-determination of the individual, and to describe that as a human right". However, in his view, "this is plainly not the sense that the right of self-determination is described and used in U.N. instruments which refer always to the self-determination of *peoples or nations*" (original emphasis), "The Role of the United Nations in the Protection of Human Rights - Is it Misconceived?" in Eide and Schou, *op.cit.*, note 2 *supra*. 95-101 at 98. Buchheit also takes a similar view and observes that "the individualistic tenor of traditional natural rights thinking cannot...be turned to the advantage of a separatist claim without incurring serious practical objection" (*Secession*, 50-51, at 51). See however an excellent critique and rejection of Buchheit's thesis by Suzuki in "Self-Determination in International Law", *Yale Law Journ.*, Vol. 89 (1979-80), 1247, at 1256. In support of the individualistic basis of the principle, Henkin argues that the human rights of the individual includes "self-government" and that in modern societies, this further includes popular sovereignty and majority rule (*op.cit.*, note 25, 28).

type of human right necessarily attract the application of self-determination as a remedial right? The logical but simplistic response would be in the affirmative. However, the preferable answer would be that the grant of self-determination, as a remedial or sanctioning right must depend on the type of human rights violated and the magnitude of the violation. This suggests that human rights exist in different degrees of importance. Which human rights then are the more important, the violations of which a group could invoke as a legitimate basis for self-determination? How do we determine the magnitude of a violation?

Another difficulty with the human rights oriented policy is that, as indicated earlier, the actual content may differ according to a society's political, economic and social values.<sup>33</sup> For instance, Western (capitalist) societies place more emphasis on political and civil rights. Eastern and Third World countries tend to emphasize social and economic rights.<sup>34</sup> How does one reconcile the various conceptual approaches to human rights in the formulation of prescriptions?

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33. See text accompanying note 29, *supra*.

34. Cranston, *op.cit.*, note 29, 76; Szabó "The Theoretical Foundations of Human Rights" in Eide and Schou (eds), *op.cit.*, note 26, 35, 43. The classification of countries into blocks is not necessarily determined by geography. It depends more on the ideological orientation of the state. For instance, Cuba is in the Western Hemisphere but ideologically it is described as an Eastern Bloc country. Similarly, Australia, Japan and South Africa are classified as Western countries even though they are in the eastern hemisphere. The "Third World" classification however is based more on an economic criteria. It is therefore possible to have a state belonging both to the Third World and either the Eastern Block or the Western Block at the same time. Cuba again, is a good example. On the classification in relation to the state's approaches to human rights see: Espiell, "The Evolving Concept of Human Rights: Western Socialist and Third World Approaches", in Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration* (1979), 41-65. Differences in economic development between the "Third World" states makes it difficult to use the term "Third World" on a general basis, see the views of van Boven, "Some Remarks on Special Problems Relating to Human Rights in Developing Countries", *Revue des Droits de L'homme*, Vol.3 (1970), 383-395 at 383; see also Tyagi, "Third World Responses to Human

Western Concepts of Human Rights

Western concepts of human rights encompass the belief in the "existence of rights and freedoms inherent in man's nature and to his status as an individual which rise above all political organizations".<sup>35</sup> The theoretical foundations of the Western concept may be found in positive and naturalist doctrines.<sup>36</sup>

The naturalists see human rights as natural rights which every human being everywhere at all times ought to have because of the fact that in contrast with other beings he is rational and moral.<sup>37</sup> The positivists on the other hand, reject the metaphysical elements of human rights. In positivist jurisprudence, human rights comprise those rights within the domestic system which a state creates as citizens' rights. Such rights are established in the society to safeguard the citizens' existence.<sup>38</sup>

Within the domestic system, naturalists see legislative enactments on human rights as the positive recognition of pre-existing natural

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34. (contd) Rights", I.J.I.L., Vol.21 (1981), 119. Henkin, *op.cit.*, note 25 *supra* at 34 and 78. Both authors suggest that the "Third World" refers to states that are neither in the "Eastern Bloc nor in the Western Bloc". This interpretation is misleading. As indicated earlier, a state could belong to the Third World and one of the remaining blocs at the same time. See also Phillips, "Why Third World", *Third World Quarterly* (1970), 105.

35. Espiell, *id.*, 50.

36. For the naturalist approach to law, see generally: D'Entrevies, *Natural Law* (1964), 196; Finnis, *Natural Law and Natural Rights* (1980); Becker, *The Declaration of Independence* (1942); Maritain, *Man and the State* (1951); Ritchi, *Natural Rights* (1895); Strauss, *Natural Rights and History* (1953); Lauterpacht, *International Law and Human Rights* (1968), 73-86; Bodenhiemer, *Jurisprudence* (1940), 103-192; Friedman, *Legal Theory* (5 ed. 1967), 95-125; See also the works of Grotius, *De Jure Bellis ac Pacis* (translation by Kelsey, 1925), particularly Bk I. On positivism see generally Friedman, *op.cit.*, *supra*, 253-286; Austin, *The Province of Jurisprudence Determined* (1945); Hart, *The Concept of Law* (1961); Kelsen, *General Theory of Law and State* (1945); *Pure Theory of Law* (1978) Bentham, *Works of J. Bentham*, Vol.1 and Vol.2 (Browning (ed.) 1843); *Of Laws in General* (Hart (ed), 1970), particularly at Chapter II.

37. Maritain, *id.*, 65.

38. Szabó, *op.cit.*, note 34, 36.

rights of man which are inalienable. Accordingly, naturalists regard the multilateral instruments on human rights as the international recognition of the inalienable rights of man in every society. On the other hand, positivists view such instruments as creative of international positive rights agreed on by states for the benefit of their citizens.<sup>39</sup>

Both naturalists and positivists agree that human rights demands constitute claims against the state. In the Western free economies, the states' major function is the regulation of the civil and political life of the individual. Thus human rights tend to emphasize such issues as freedom of speech, of association, etc. The rationale of this doctrinal approach is summed up by Espiell when he observes: "without the reality of political and civil rights and without the effectiveness of freedom as understood in the broadest sense, economic and social rights have no significance".<sup>40</sup>

### Eastern Socialist Concepts of Human Rights

The concept of human rights among Eastern countries is based on Marxism. In Marxist jurisprudence, the distinctions between positive and natural law approaches is considered irrelevant. All rights are seen as derivative from the state.<sup>41</sup> Marxists argue that the state's commitment to human rights and to enactments generally is influenced by objective meta-legal factors such as the property relations in the society. Thus the content and the system of implementation of human

39. Henkin, *op.cit.*, note 25, 22.

40. Espiell, *op.cit.*, note 34, 44.

41. Szabö, *op.cit.*, note 34, 39-40. Dean, "Beyond Helsinki: The Soviet View of Human Rights in International Law", *Va. Journ. Int'l. L.*, Vol. 21 (1981), 55, particularly 79-91.

42. *Ibid.* See also Lopatka, "On the Notion of Human Rights" *GDR, C'ttee for Human Rights Bulletin*, Vol. 4 (1979), 5, at 6-7. See generally also Engels, *Anti Duhring* (1969); Henkin, *op.cit.*, note 25, 56-70, particularly at 56-58; McDougall *et al.*, *op.cit.*,



rights would depend on the stage of economic and technical development of the society in question, and on what social class is in power and whether it looks upon its own interests as those of the society.<sup>42</sup>

The Eastern approach suggests that where a society is for instance controlled by a capitalist class, the content of human rights is only a reflection of the values and interests of that dominant class.<sup>43</sup> Similarly, in a socialist society, where the state is under the dictatorship of the proletariat, the content of human rights is reflective of the interests of the broad masses of the people.<sup>44</sup>

Eastern states attempt to "actualize and concretize" human freedom by preventing the economic enslavement of the individual to other individuals in the society. Thus the economic freedom of each person is considered supreme and the fundamental basis for the other rights of the individual.<sup>45</sup>

At the international level, the Eastern approach to human rights is based on an interpretation of the Marxist doctrines in global terms. The international process is regarded as representative of a continuing class struggle generated by the concentrated control of capital and the means of production by a relatively small minority.<sup>46</sup> At the international level, the emphasis is therefore on economic and political self-determination of peoples and on social and cultural rights.

42. (contd) note 25, 76-79, particularly at 76. On law and property see Marx, "Economic and Philosophic Manuscripts", in *Marx and Engels, Collected Works*, Vol. III, 297.

43. In Marxist doctrine, the notion of human rights in such societies is considered to be a "bourgeois illusion". Cranston, *op.cit.*, note 29, *supra*. 3, 75.

44. Szabö, describes human rights in his context as "genuine citizens rights", *op.cit.*, note 34, 41.

45. Erh-Soon Tay, "Marxism, Socialism and Human Rights" in Kamenka *et al.* (eds) *Human Rights* (1978), 105.

46. McDougal *et al.*, *op.cit.*, note 25, 76.

### Third World Concepts of Human Rights

It has been suggested that "under-development combined with foreign exploitation, poverty, illness and illiteracy...impose a common approach to human rights on the Third World countries."<sup>47</sup> In these states, economic and social realities force statesmen to give at least a *de facto* pre-eminence to economic and social rights over civil and political rights. Third World states regard economic development as the most important national task in modern times. It has therefore been argued that at times, limitations on civil and political rights may be necessary to help them in their efforts at modernization and development. The need for rapid economic development may cause state officials to detract from some human rights obligations.<sup>48</sup> After all, the argument goes, constitutional guarantees of freedom of movement would only be an abstract paper right to a villager with no meaningful communication links; and freedom of speech would mean little to a starving illiterate. The theoretical basis of this argument is that there is a correlation between the level of economic development and a state's ability to honour its human rights obligations. Thus given the low level of development in the Third World, the latter cannot be expected to honour human rights commitments in the same manner as the developed states.<sup>49</sup>

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47. Espiell, *op.cit.*, note 34, 60.

48. One commentator notes in the case of Africa that the states "are pre-occupied with the task of nation-building and may have to use stern measures to integrate (their) diverse communities... The rapid economic development of the country may also lead to decisions which might detract from the high ideals expressed in the Human Rights Covenants" (Adegbite, "African Attitudes to the International Protection of Human Rights" in Eide and Schou, *op.cit.*, note 26, 69, 76.)

49. Bystricky, *op.cit.*, note 30, 91; van Boven, *op.cit.*, note 34. Ramcharan, "A Critique of the Third World Responses to Violations of Human Rights", in Antonio Cassese (ed.), *U.N. Law: Fundamental Human Rights: Two Topics in International Law* (1979) 249. See also Donnelly, "Human Rights and Developments: Complementary or Competing Concerns", *World Politics*, Vol. XXVI (1984),

In international fora, Third World states emphasize economic and social rights and the right of self-determination in respect of foreign domination and exploitation. They also stress the right of permanent sovereignty of states over their natural resources for the benefit of their peoples. The general philosophy of the Third World was summed up in General Assembly Resolution 32/130 when they declared:

The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.

Patterns Common to the Different Conceptions of Human Rights

Despite the differences in conceptual approaches to human rights, it is possible to identify certain trends and patterns that are common to Eastern, Western and Third World states. For instance, with the exception of South Africa, every state, at least theoretically, prohibits

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49. (contd) 255. The "development argument" is hardly acceptable. It presupposes wrongly, that development has the characteristic of a *lex lata* and can therefore be used to justify violations of human rights. It also involves the risk of being used as a guise for flagrant violations even where they could be avoided. In any case, given the perennial stage of underdevelopment in the Third World, the "development argument" could serve as a permanent warrant to exclude the enjoyment of human rights. For a critique of the development argument see: Mower, Jr., "Human Rights in Black Africa, A Double Standard", *Revue des Droits de L'homme*, Vol. 9 (1979), 39-70; Emerson, "The Fate of Human Rights in the Third World", *World Politics*, Vol. 27 (1974-75), 200; Schreiber, in Eide and Schou, *op.cit.*, note 26, 272-3. For a general discussion on human rights in the Third World see Henkin, *op.cit.*, note 25, 78-88; Mojekwu, "International Human Rights: The African Perspective", in Nelson and Green, *op.cit.*, note 25, 84. Shepherd Jr., *op.cit.*, note 30. Falk, "The Algiers Declaration of Rights of Peoples and the Struggle for Human Rights", in Cassese, *op.cit.*, note 47, 225-235. Rigaux, "The Algiers Declaration of the Rights of Peoples", *id.*, 211; Elias, *Human Rights and Developing Countries*, report to the 8th Study Session of the International Institute of Human Rights, Strasbourg, July 1977; Welch, "The OAU and Human Rights: Towards a New Definition", *J.M.A.S.*, Vol. 19 (1982), 401. On the question of human rights and the right to development, see generally: Zalaquett, "An Interdisciplinary Approach to Development and Human Rights", *Boston College Third World Journ.*, Vol. 4 (1983), 1, particularly 24-43. See also Report of the Working Group on the Right to Development of the U.N. Commission for Human Rights, E/CN.4/1984/13 (14 Nov.1983). *New Horizons in International Law* (1980), 159-76. See also a collection of works in *Hague Recueil* (1979), special edition on the right to development.

racial discrimination. The right to life is accepted as basic by all societies and slavery is regarded as illegal.

Notwithstanding the emphasis on economic, social and cultural rights, a considerable number of Third World constitutions make provision for civil and political rights. In their organizational collectivities, Third World states generally support such rights. For instance, the African Charter on Human and Peoples Rights provides for civil and political rights similar to the provisions of the United Nations Covenant.<sup>50</sup> The Charter of the Organization of American states makes similar provisions too. In similar terms, Eastern states also recognize civil and political rights. However, such rights are to be exercised in conformity with the interests of the workers and for the purposes of strengthening the socialist system.<sup>51</sup>

Western states also accept economic and social rights in their constitutions and national programs. In fact, with the emergence of welfare systems and social security services, the idea of the Western states as a *laissez faire* individual-centred and exploitative society is fast becoming obsolete. Modern Western societies are now best described as welfare states.<sup>52</sup>

One could draw the following conclusions from the differences and similarities in the conceptual approaches to human rights: the significance attached to any set of human rights varies according to the values of the society. But notwithstanding any variations, there is an

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50. I.L.M., Vol. 21, 68, Articles 1-19.

51. Erh-Soon Tay, *op.cit.*, note 45, 111; Henkin, *op.cit.*, note 25, 57;

52. Henkin notes that, in the field of human rights, there is now a measure of convergence between the Western libertarian democracies and the communist peoples democracies. "The West... has moved to provide basic human needs to all and to put some limit on economic inequalities; communism...has been moved to make at least some commitment to civil rights and political freedoms" (Henkin, *id.*, 77-78).

identifiable category of human rights norms generally valid and acceptable to all the societies.

### The Hierarchy of Human Rights

The category of human rights norms which is generally accepted has a universal characteristic and constitutes what has been described as the minimum content of human rights.<sup>53</sup> The minimum content idea implies that certain human rights are so essential and of such high value to the individual that they are indispensable for normal existence.<sup>54</sup> They comprise the absolute minimum basic rights that a society must ensure to its citizens. Consequently, their violation is of great concern to all states irrespective of political, cultural or ideological differences.<sup>55</sup>

In support of the minimum content idea, it has been argued that "there is quite a difference between the right to vote and the right to life".<sup>56</sup> A state may adopt a one party system and ignore calls for periodic elections and perhaps justify its actions on the need for economic development and other related problems. However, it is doubtful whether any state can use economic development as a reason for taking away one's life.<sup>57</sup>

It has been suggested that to identify the minimum content one ought to examine the importance of the right in the life of the individual and its relevance to the community of nations.<sup>58</sup> Theo C. van Boven

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53. Ganji, *International Protection of Human Rights* (1962), 123-125.

54. *The Barcelona Traction Case* (2nd phase), I.C.J. Rep. (1970), 3 at 32.

55. *Ibid.*

56. Riesenfeld, in *Human Rights Protection of the Individual Under International Law*. Proceedings of the Fifth Summer Conference on International Law, Cornell Law School (1949), 88, 89.

57. *Id.*, 89; in support of the minimum content, Bay argues that "the overall humanist aim must be to establish rationally defensible priorities among human rights" (*op.cit.*, note 25, 8). In his view, "physical survival or the right to life must obviously take precedence over all competing claims" (p.14).

58. Lopatka, *op.cit.*, note 42, 22.

develops this criteria further and argues that the minimum content of human rights are those with the following characteristics: They form the basis of the international community as represented today by the U.N.; U.N. members are pledged to respect and observe them. In case of breaches, U.N. members may adopt measures to stop them; such rights are also binding on non-U.N. members.<sup>59</sup> van Boven's criteria appear too broad and lack specificity. In an attempt to be more specific Ganji has suggested that the minimum content includes the right to life, the right to liberty and the principle of legality.<sup>60</sup> The term "liberty" is rather vague; and there could be different conceptions of legality. This makes Ganji's proposition unacceptable.

A better view on the minimum content is put forward by Brownlie. He observes that since 1945 developments concerning human rights have come to provide a new content for international standards based on those human rights principles which have become a part of customary international law.<sup>61</sup> He notes that such principles include:

- . non discrimination on the ground of race
- . the prohibition of genocide
- . the prohibition of torture and of inhuman or degrading treatment or punishment.<sup>62</sup>

Brownlie's views find support in the decision of the *Barcelona Traction Case*.<sup>63</sup> The majority held that certain international obligations of the state are *erga omnes*. They include "the principle and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".<sup>64</sup> In the *South West Africa case*,

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59. Quoted in Lopatka, *ibid*.

60. Ganji, *op.cit.*, note 53.

61. Brownlie, *Principles*, 528.

62. *Ibid*.

63. Note 54.

64. *Ibid*.

Judge Tanaka also took a similar view in his dissenting opinion when he noted: "the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law".<sup>65</sup>

Article 4 of the Covenant on Civil and Political Rights supports the minimum content notion. It provides that signatory states may derogate from their obligations under the Covenant in times of national emergencies that threaten the life of the community. However, it prohibits derogation from any obligations in relation to the right to life, freedom from torture, slavery and servitude. By implication, these rights constitute the more basic human rights or the minimum content of rights from which no state can be excused.<sup>66</sup>

State practice supports the idea of a minimum content. Human rights such as freedom of speech, and the freedom of movement are not necessarily honoured in all countries. However, international concern for such denials is relatively minor. On the other hand, such incidents as the Sharpeville and Soweta massacres and racial discrimination in South Africa tend to attract international condemnation. Similarly mass executions in Kampuchea, Burundi,<sup>67</sup> Uganda and Equatorial Guinea and

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65. I.C.J. Reports (1966), 293.

66. Article 2 of the European Convention on Human Rights also provides for the right to life, Article 3 allows for freedom from slavery or torture or inhumane treatment or punishment. Article 15 provides that in a national emergency that threatens the life of the nation, a state is allowed to suspend its obligations under the Convention except for Articles 2 and 3. See the comments of Korowitz in the Proceedings of the Fifth Summer Conference, *op.cit.*, note 56, *supra* at 114-145.

67. For a treatment of the Kampuchean issue, see Leo Kuper, *Genocide* (1981), 154-160. Ponchard, *Cambodia Year Zero* (1978); Shawcross, "Cambodia", *Far Eastern Economic Review*, 95 (Jan. 1977), 18-24; "Cambodia Nightmare Without End", *id.* (April, 1978), 32-34. But for a different account of the events in Kampuchea see generally: Chomsky and Herman, *After the Cataclysm: Postwar Indochina and The Reconstruction of Imperialist Ideology* (1979); On Burundi, see generally: Lemarchand and Martin, *Selective Genocide in Burundi*, M.R.G. Rep. No 2 (1974); Melady, *Burundi: The Tragic Years* (1974); Bowen, Freeman and Miller, *Passing By: The United States and Genocide in Burundi* (1973); Leo Kuper, *id.*, 162-165, 176.

extermination of indigenous tribesmen in Brazil,<sup>68</sup> have attracted world wide condemnation.

In modern times, another action which usually attracts considerable international concern is "ethnocide" or cultural genocide,<sup>69</sup> which involves the deliberate deprivation or destruction of the cultural heritage of a people. None of the views on the minimum content of human rights outlined above mentions 'ethnocide'. The present rules of international law do not recognize freedom from ethoncide as part of the "principles and rules concerning the basic rights of the human person".<sup>70</sup> Nevertheless it is desirable to include freedom from ethnocide in the minimum context particularly in respect of ethnic minorities and indigenous tribes. The destruction of the cultural heritage of a people could well mean the obliteration of their ethnic identity and sense of community existence. In view of these possible effects it would be ludicrous to include genocide, racial discrimination and slavery in the minimum context of human rights but exclude ethnocide.

The concept of the minimum content could be used as the yardstick for determining a state's conformity with human rights and as the basis of a community policy on post-colonial self-determination. By implication, a claim ought to be admissible where it is founded on a breach

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68. On Uganda, see generally the International Commission of Jurists, *Violation of Human Rights and the Rule of Law in Uganda* (1974); *Uganda and Human Rights*, Report to the United Nations (1977). On the Brazilian Indians see Lewis, *Genocide, A Documentary Report on the Conditions of the Indian Peoples of Brazil* (1974). See also U.N. Human Rights Communication No. 478, 29 Sept. 1969. The tribes involved are mainly those of the Amazon River region.

69. See page 317, *infra*.

70. See discussions in this regard at page 318, *infra*.



of the minimum content of human rights of the group concerned. For our purposes, it is submitted that the minimum content would include freedom from:

- . genocide or deprivation of security
- . ethnocide or cultural genocide or the deprivation and or destruction of cultural heritage
- . racial discrimination.

In the claim categories discussed earlier, one sees that separatist claims are hardly ever founded on torture, slavery or servitude. The rights relating to such inhumane treatments have therefore not been included in the minimum content for the purposes of post-colonial claims. They nevertheless remain essential parts of the minimum content of human rights in general.

#### The Peaceful Resolution of Territorial Disputes

In the post-WWI period, self-determination was used as the basis for some territorial settlements in Europe.<sup>71</sup> It has consequently been argued by Bowett that in the post-colonial era, the principle could be used to resolve the boundary disputes prevalent in Africa and the Third World in general.<sup>72</sup>

It is submitted that the use of self-determination for such disputes is not without its own problems. The political realities of some territorial conflicts could render the principle unsuitable. Such difficulties make it prudent to prescribe the practical limits within which the principle can be applied for dispute settlements. Crawford

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71. Pages 6-7, *supra*.

72. Bowett, P.A.S.I.L. (1966), 129 at 132. He cites the cases of West Irian and Yemen to support his proposition. It is however doubtful whether his example of Yemen is appropriate. The Yemeni case involved civil strife for control over national government. There was no dispute as to the title over Yemeni territory as such. See Boals, "The Relevance of International Law to the Internal War in Yemen", in Falk (ed.), *The International Law of Civil War* (1971), 303-347.

supports the need to restrict the principle to particular types of disputes.<sup>73</sup> However, he fails to specify the types of disputes. For our purposes, it is recommended that self-determination is suitable and ought to be used for the following categories of territorial disputes:

1. Where the issue of self-determination was not settled before the withdrawal of the colonial power and the territory subsequently becomes the subject of a dispute.
2. Where the territory is the subject of a dispute, the settlement of which involves a possible transfer of it, with its people, to a state other than the controlling state.
3. Recovery of occupied territory.
4. Where a claim is founded on a *bona fide* case of absence of consent for territorial association.

If the application of self-determination is restricted to the foregoing "specified" forms of territorial disputes, one opens up the possibilities of a better reception of the principle by the world community in the post-colonial era. This is because such an approach would conform to the generally accepted views that:

1. A people cannot be transferred from sovereign to sovereign without their consent.<sup>74</sup>
2. The right to self-determination is *erga omnes* to all other claims on their territory where the latter has not exercised

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73. *Crawford*, 93.

74. In modern times, a decision by a state to transfer a portion of its population would be an appropriate matter for investigation by the United Nations Human Rights Commission and that the General Assembly could adopt a resolution condemning the action as a "crime against humanity", de Zayas, "International Mass Population Transfers", *Harvard Int'l.L.Journ.*, Vol. 16 (1975), 207-257, 253, 208, 223, 245. See also Suzuki, "Self-Determination and World Public order", *Va.Journ.Int'l.L.*, Vol. 16 (1975-76), 827-828.

the right.<sup>75</sup>

3. In modern times, the acquisition of territory by force is illegal<sup>76</sup>, and,
4. free consent is a fundamental element of the exercise of self-determination.<sup>77</sup>

It is conceded that there are cases that are not necessarily consistent with these views.<sup>78</sup> It must however be emphasized that such instances constitute a special regime and are exceptions rather than the rule in modern international law.

#### ADMISSIBLE CLAIMS OF SELF-DETERMINATION IN THE POSTCOLONIAL CONTEXT

On the basis of the identified community goals and the prescribed human rights oriented policy on post-colonial self-determination, it is

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75. Page 80, *supra*. See however note 78, *supra*.

76. There is considerable support for this proposition. In the Declaration on Friendly Relations, the General Assembly stated that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal". Jennings also observes, "it seems to me that one is driven to accept the position that conquest as a title to territorial acquisition has ceased to be part of the law" (Jennings, *The Acquisition of Territory in International Law* (1963), 56); Wright, "The Middle East Problem", A.J.I.L., Vol. 64 (1970), 270; Sagay, "Can Territory be Acquired by Military Conquest Under Modern International Law", *Rev. Egyptienne de Droit Int.* (1968), 56; Schwebel, "What Weight to Conquest?" A.J.I.L., Vol. 64 (1970), 344, 345. Lauterpacht, "Jerusalem and the Holy Places", *Anglo-Israel Association Pamphlet No. 19* (1968), 52. But see the views of Kelsen, *Principles of International Law* (Tucker (ed.), 1967), 420-433.

77. Pages 37-66, *supra*.

78. On the issue of territorial transfers for instance, the following may be noted: "In the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of sovereignty" (*Aaland Islands Case* (1921)). The validity of this statement in modern times is doubtful. However, a more recent case which nevertheless remains an exception, is the transfer of the Rann of Kutch by India to Pakistan. See Setpal, "Self-Determination in International Law". I.J.I.L., Vol. 10 (1969-70), 480; Chacko, "The Rann of Kutch and the International Law", I.J.I.L., Vol. 10, 147-175; Rama Rao, "An Appraisal of the Kutch Award", *id.*, Vol. 9, 143; Rahmatullah Khan, "Relinquishment of Title to Territory: The Rann of Kutch Award: A Case Study", *id.*, Vol. 9, 158. See also pages 94-102, *supra* for other examples that are not consistent with these general views.

recommended that claims ought to be considered admissible in the following instances:

1. Genocide or the Deprivation of Security

When a people is denied the minimum content of human rights through genocide or a general situation of insecurity, a demand for a secessionist self-determination ought to be permissible. When a group demands secession in the face of genocide, its action is usually a response to a deteriorating state of affairs under which no alternative remedy appears available within the state system.<sup>79</sup> This was demonstrated in the case of Biafra<sup>80</sup> and Bangladesh.<sup>81</sup> In such instances, the group's only remedy is to foster a break with the parent community and to establish their own independent institutions to restore security and protect their rights.

Genocide as a phenomenon is not new in the history of mankind. However, the term "genocide" is fairly new. It appears to have been first used by Raphael Lemkin in the early 1940s. He used it to mean the destruction of a "nation or ethnic group".<sup>82</sup> In his thesis, such a destruction could occur not only through mass killing but also through a co-ordinated plan of different actions aimed at the destruction of a national group.<sup>83</sup>

In 1948 the United Nations General Assembly adopted a draft Convention on the Prevention and Punishment of the Crime of Genocide with made genocide a crime under international law.<sup>84</sup> Since then the

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79. Suzuki, *op.cit.*, note 74, 798.

80. For a documentary account of the fruitless attempts to resolve the Biafra case see NYUJILP, Vol. 2 (1969), 398-433.

81. Page 217, *supra*.

82. Lemkin, *Axis Rule in Occupied Europe* (1944), 79; "Genocide as a Crime Under International Law", A.J.I.L., Vol. 41 (1947), 145-151.

83. Lemkin, *op.cit.*, (1944), 54 *supra*, *ibid*.

84. For a historical evolution of the U.N. law on the crime of  
(contd)

United Nations' definition of genocide has become acceptable as standard in international law.

The Convention defines genocide as "any of the following acts committed with *intent*<sup>85</sup> to destroy in part<sup>86</sup> or in whole a national, ethnical, racial or religious group<sup>87</sup> as such:

- a. killing members of the group;
- b. causing serious bodily or mental harm to members of the group;

84. (contd) genocide see Kunz, "The U.N. Convention on Genocide", A.J.I.L., Vol. 43 (1949), 738.

85. The mental element is of great significance in defining genocide. It is the specific intent to destroy a group as such that distinguishes the crime from the Common Law crime of murder (Kunz, "Present Day Efforts at International Protection of Human Rights. A General Analytical and Critical Introduction" (1951), P.A.S.I.L. 111-112.) "It is not enough to kill persons belonging to a different race or religion, but these murders must be committed as part of a plan to destroy the given...group. Where such specific intent is lacking there is no genocide" (Lemkin, The U.N. Genocide Convention, printed as an extension to the remarks of Mr. Celler of the New York 95th Congress, Rec.Ap. A1224). See also the works of Bedau, "Genocide in Vietnam", Boston Univ.Law Rev., Vol. 53 (1974), 574-622. He argues that "the issue, of course, is not whether a person would candidly avow his intentions; it is whether one must be able to do so as a necessary condition of being said to have acted with the intention in question" (at 602). Bedau further argues that genocidal intent could sometimes be inferred from the act (at 603). See also Byrant, "Comment on the Genocide Convention of 1948" (Harvard Journ.of Int'l.L., Vol. 16, 692; 3 U.N. G.A.O.R. 6th C'ttee, 89-97 (1948)); Paul Sartre submissions to the International War Crimes Tribunal in 1965, quoted in Bedau, *op.cit.*, *supra* at 479 *seq.*

86. The phrase "in part" has been interpreted to mean a substantial part of the group concerned (Byrant, *op.cit.*, note 85, 691); The phrase was initially suggested by the Norwegian delegate. A French proposal that the killing of one person ought to be enough was rejected (U.N. G.A.O.R. 6th C'ttee, 91-92).

87. For a critique on the restriction of the definition to only such groups see Kulski, P.A.S.I.L. (1951), 13; Kunz, *id.*, 110-112. Kunz also attempts to explain the exclusion of political and economic groups by saying that states would be reluctant to have their political or economic affairs scrutinized by the international community; Finch, "The Genocide Convention", A.J.I.L., Vol.43 (1949), 732. He argues that the restriction is rather dangerous because a state could persecute a religious group and yet argue that they constitute political enemies and are a security risk. See for instance the case of the Jehovah's Witnesses in Central Africa in a report by Hodges, MRG Report No. 29 (1976). The persecution of non-Muslim religious groups in Iran is another case in point.

- c. inflicting on the group conditions of life calculated to bring about its physical destruction;
- d. imposing measures intended to prevent births within the group;
- e. forcibly transferring children of the group to another group.

The cases discussed in the case categories using Biafra and Bangladesh, would indicate that in empirical terms, situations 'a', 'b' and 'c' are the more common forms of genocide that constitute the basis for post-colonial self-determination claims.

Under the Convention, genocide is a crime punishable whether committed by a private person, public official, or constitutionally elected rulers.<sup>88</sup> Signatories to the Convention undertake to punish offenders within their municipal legal systems under municipal enactments.<sup>89</sup>

Despite the well meaning efforts of the General Assembly, the Genocide Convention, neither prevents nor punishes the crime in any effective way.<sup>90</sup> Municipal methods could admittedly, prevent and punish genocide committed by private individuals. However, it is rather difficult to conceive of a major successful plan of genocide unless the perpetrators were to gain control of the state and thus make their actions state-sponsored. In fact, since ancient times, few cases of genocide have ever succeeded without state support and the perpetrators acting as agents of the state.<sup>91</sup> In spite of this, the Convention

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88. Article IV.

89. Article V.

90. Kunz, *op.cit.*, (1951), note 87, 111-112.

91. *Ibid.* Levasseur, "Prevention of Genocide", *Journ.of Int.Comm. Jurists*, Vol. 8, No. 74 (1974), 75-82; Lane, "Mass Killing by Governments, Lawful in World Legal Order", *NYUJILP* (1979), 239-280; Fein, *Accounting for Genocide* (1979), 9. She argues that "we must first recognize it (genocide) as organised state murder"; Horowitz, *Taking Lives: Genocide and State Power* (1980), 17, "Genocide is a structural and systematic destruction of innocent people by a state bureaucratic apparatus"; Leo Kuper, *International Action Against Genocide*, MRG Report No. 53, 3, "for the most part, genocide is a crime of governments".

fails to deal with the issue of state responsibility effectively. Article IX provides that disputes between contracting parties relating to state responsibility shall be submitted to the I.C.J. at the request of one of the parties. Since the Convention became operative, there have been reported cases in Bangladesh, Burundi and Paraguay.<sup>92</sup> None of these was brought before the I.C.J. It would seem correct to suggest that no matter how concerned states might be about a case of genocide, they would generally be reluctant to take the issue as far as the I.C.J. The economic cost and political considerations would seem to discourage states from pursuing such cases.

Given the ineffective system of international protection, municipal courts are the only tribunals that can be expected to punish and deter offenders. However, one cannot expect a state to punish its officials who act as its agents in a case of genocide. The only times when state officials could perhaps be punished may be during revolutionary changes in governments.<sup>93</sup> In Kampuchea, after the overthrow of Pol Pot, the new regime tried him and his deputy in absentia. They were found guilty of genocide by a Peoples Revolutionary Court.<sup>94</sup> After the military take-over in Equitorial Guinea, President Macias was also found guilty of genocide and subsequently executed.<sup>95</sup>

Where there are no such revolutions, a group faced with a threat of genocide is virtually unprotected. The state-perpetrator may yield to international public opinion, and perhaps terminate its actions. However, one cannot rely on international public opinion because of its limited effectiveness. By its very nature public opinion takes a long time to consolidate and to produce any serious impact for a state to

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92. Note 67 *supra*; on Paraguay see generally Arens (ed.), *Genocide in Paraguay* (1976). The affected groups are the Guyaki Indians.

93. Levasseur, *op.cit.*, note 91.

94. Leo Kuper, *op.cit.*, note 91.

95. *Ibid.*

take note of. In any case, public opinion on a given case of genocide can only be formed after the case has gone under way and assumed substantial proportions. The instances of the late president Macias, ex-president Bokassa, Idi Amin and the Burundi massacres indicate that international public opinion does not necessarily change the minds of state officials bent on exterminating a section of their population.

In view of this, it is submitted that in modern times, genocide has little or no preventive or punitive remedies.<sup>96</sup> It is therefore recommended that a secessionist claim founded on genocide or a deprivation of security ought to be admissible. If self-determination is accepted in such cases, it could operate as a preventive and punitive remedy. Since states are generally keen on preserving their territorial integrity, a state would be deterred from taking any action against a section of its people if that action would entitle them to claim a right of secession in the eyes of the international community. Self-determination could be punitive because where the state proceeds to commit genocide, the group affected could claim it as a sanctioning right against the state.

## 2. Cultural Genocide or Deprivations and or Destruction of Cultural Heritage

A UNESCO publication defines culture "as being one of tradition in the broadest sense".<sup>97</sup> It includes all that is inherited or transmitted through society. It therefore includes the formal training of the young in the body of knowledge or creed, inheriting or customs or attitudes from previous generations, and the circulation of

96. See, however, the suggestions by Fein, "Crimes Without Punishment" in Nelson and Green (eds), *op.cit.*, note 25, 251, 259-264.

97. Leinis, *Race and Culture*, UNESCO 1 (1958), 21.



legends or jests by word of mouth.<sup>98</sup> The content of a culture enhances a group's prestige and respect and provides an authentic source of identity and unity.<sup>99</sup> The destruction of a group's culture therefore implies the loss of its identity and self-esteem. The destruction of a group's culture is cultural "genocide" or "ethnocide".

Cultural genocide was defined in the draft Convention on Genocide as any act of

- (i) Prohibiting the use of the language of a group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
- (ii) Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.<sup>100</sup>

The policy of assimilation adopted by many colonial powers during colonialism basically involved cultural genocide.<sup>101</sup> In modern times, the cultures of many indigenous peoples are threatened with destruction and extinction due to economic development and exploitation of resources. However, this has not been presented before as a basis for separatist claims. An examination of the claim categories indicates that in places like Tibet where there have been reports of cultural destruction it has not been pursued as a result of an economic activity or development. Cultural destruction in these cases is the result of a systematic policy to destroy the group's culture as such. It is this type of destruction that provides the basis for a remedial claim of self-determination in the post-colonial context.

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98. *Ibid.*

99. Suzuki, *op.cit.*, note 79, 830.

100. E/794.

101. Bedau, *op.cit.*, note 85, 591.

Despite the importance of cultural identity, victims of cultural genocide are hardly protected in international law. The text of the draft Convention on Genocide defined and listed cultural genocide as a crime under international law. But during the discussions of the draft in the Sixth Committee, the delegates voted 25 to 16 with 4 abstentions not to include cultural genocide in the Convention.<sup>102</sup> Thus the final draft made no mention of it. The delegates however, emphasized that their failure to include cultural genocide in the Convention should not be construed to mean they had taken any definite position on it. The Committee indicated that the delegates generally conceded that the question of protecting group cultural rights could be appropriate under human rights instruments.<sup>103</sup> Thus it is to these instruments that one must look for safeguards on cultural rights.

Article 27(1) of the Universal Declaration on Human Rights provides that everyone has the right freely to participate in the cultural life of the community. There is a similar provision in Article 15 (1) of the International Covenant on Economics, Social and Cultural Rights. The Covenant provides that signatories "recognize the right of everyone to take part in cultural life".

The cultural provisions in both documents are very ambiguous and in any case do not provide any effective protection against cultural genocide. None of the instruments has any protocols to ensure effective enforcement.<sup>104</sup> Under the Covenant, states undertake to submit reports on the progress of implementation of the terms or its provisions in their territories. It is however, very doubtful whether any state would submit a report on its own violations of the terms of the Covenant.

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102. A/C.6/214, 83rd M'tting.

103. *Ibid.*

104. Szabo', *Cultural Rights* (1974), 62-64, for comments on the problems that arise from the absence of such protocols.

In Resolution 329, the U.N. General Assembly called on states to promote indigenous languages and to make these languages where and whenever possible the language of instruction in elementary, primary and secondary schools. Even though this resolution relates to the protection of culture, General Assembly resolutions are generally not binding in law. The resolution therefore has no binding validity.<sup>105</sup> The General Assembly has made other attempts to protect the cultural lives of groups. However its activities have usually been restricted to fact finding and investigations.<sup>106</sup>

Other United Nations agencies have shown interest in cultural protection. In 1965, a U.N. Seminar on "The Multinational Society" held in Ljubljana, Yugoslavia, discussed issues relating to the maintenance of indigenous traditions, the protection of ancient values and the right of ethnic religious or linguistic minorities to use their own languages.<sup>107</sup> The General Assembly and ECOSOC further initiated studies into the protection of indigenous minorities in 1965.<sup>108</sup> The activities of the Food and Agricultural Organization (FAO) and World Health Organization (WHO) also benefit indigenous cultures in terms of

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105. One could nevertheless say that such a resolution is legally binding insofar as it purports to interpret the Charter provisions on Human Rights (see the views of Tanaka in the *South West Africa Case*, I.C.J. Rep. (1966), 293.) This view is, however, very debatable. See pages 16-17, *supra*.

106. In 1949, for instance, the Assembly requested ECOSOC, with the assistance of the Specialized Agencies and the Inter-American Indian Institute to conduct studies on the situation of the indigenous populations of America (see generally ECOSOC, Commission on Human Rights Sub-Commission on Prevention of Discrimination and the Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*. Progress Report submitted by the Special Rapporteur, Martinez, E/CN.41 Sub. 21, 584 (June 1973), 6-22.)

107. Sohn and Buergenthal, *International Protection of Human Rights* (1973), 331-333.

108. For a discussion of the work of General Assembly and other agencies of the U.N. in the protection of indigenous culture see Galey, "Indigenous Peoples, International Conscious Raising and the Development of International Law on Human Rights", *Revue des Droits de L'homme*, Vol. 8 (1975), 21-39.

the preservation of forest regions and the provision of health care. However, none of these activities is aimed specifically at the prohibition of cultural genocide; they only relate to the protection of indigenous minorities.

Even though UNESCO is mainly associated with the promotion of culture and scientific education, the Council has not been effective in the protection of cultural rights. Of the several conventions adopted by the organization, none seems to be directly related to the issue of the prohibition of ethnocide.<sup>109</sup>

The only international convention of any great significance to the prohibition of ethnocide is the I.L.O. Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.<sup>110</sup> The Convention provides that signatories must create "possibilities of national integration of indigenous tribal and semi-tribal groups into national life".<sup>111</sup> More significantly, the convention prohibits the use of any measures "tending towards the artificial assimilation of these populations".<sup>112</sup>

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109. The only UNESCO instrument that comes close to ensuring protection of culture is the Declaration of Principles of International Cultural Co-operation. Article 1 provides:

1. Each culture has a dignity and value which must be preserved.
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in reciprocal influences they exert one another, all cultures form part of the common heritage belonging to all mankind (adopted by the UNESCO General Conference, Nov. 4, 1966).

The overall cultural policy of UNESCO emphasizes elements of national culture rather than the culture of particular groups. See generally *UNESCO Cultural Policy: A Preliminary Study, Studies and Documents on Cultural Policies* (Paris), UNESCO, Vol 1 (1969), 49; *Cultural Rights*, Vol. III, Paris, UNESCO (1970), 125.

110. There are two I.L.O. Conventions with this title. They are Conventions 104 and 107; only the latter is of relevance for our purposes. The text is reproduced in U.N.T.S., Vol. I, 4738.

111. Article 2(2)(c). For a comparative discussion of the rights of indigenous peoples particularly in Canada and the United States see: "The Rights of Indigenous Peoples: A Comparative Analysis" P.A.S.I.L. (1974), 265.

112. *Ibid.*

Any process of integration undertaken must "take due account...of the cultural and religious values and of the forms of social control existing among these populations".<sup>113</sup> The convention further provides that "these populations shall be allowed to retain their own customs and institutions where they are not incompatible with the national legal system or objectives of the integration".<sup>114</sup>

Article 23 of the convention provides for the teaching of the mother tongue or a language commonly spoken by the group to its children. The signatories, therefore, undertake to ensure "appropriate measures...as far as possible...to preserve the mother tongue or the vernacular language" of such populations in their territories.

Under the I.L.O. constitution a member state who is a signatory to the convention may file a complaint against any other member signatory who violates the terms.<sup>115</sup> This may appear to be an effective way to ensure the protection of cultural rights. However, in practice the provision is not very useful. It is only restricted to signatory states. It is therefore doubtful if it would apply to a non-party state that embarks on cultural genocide. Secondly, the complaint provision is hardly ever used by states.<sup>116</sup> When it has been used, the states' actions have usually been dictated by political considerations rather than objective evaluations of the situations complained of. It is therefore possible that a genuine case of cultural genocide may never come up before the I.L.O.<sup>117</sup>

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113. Article 4.

114. Article 7.

115. Articles 26-29 and 31-34 (I.L.O. Constitution).

116. Proceedings of the Fifth Summer Conference, *op.cit.*, note 31. *supra*, 143.

117. *Ibid.* On the I.L.O.'s competence to deal with the issues of indigenous culture generally see Bennett, "The I.L.O. Convention on Indigenous and Tribal Populations. The Resolution of a Problem of Vires", B.Y.I.L., Vol. XLVI (1972-73), 382-392.

The predicament of a group that faces cultural genocide is that it has hardly any remedies. Any such group has to make a choice between the impossible task of resisting cultural assimilation on the one hand and the acceptance of the destruction of its culture and identity on the other hand. The case of Tibet would seem to suggest that resisting cultural assimilation is virtually impossible. This is because a situation of cultural genocide presupposes the cultural subjugation of the victimized group. This may be achieved easily through brutal force or any other forceful means. In Tibet, monks and other Tibetans who resisted Chinese instructions and changes in the community were subjected to brutal punitive measures by the Chinese resident administration.<sup>118</sup>

It is submitted that in the post-colonial context, secession ought to be supported as a protective remedy against ethnocide. Self-determination for claimants in this category would imply the right to establish an independent community in which they can freely pursue among others, their social and cultural rights. This recommendation would favour the admission of the claims of Tibet.

### 3. Racial Discrimination

A variety of international instruments prohibit racial discrimination. In municipal legal systems, states have incorporated or adopted such instruments as part of their attempts to protect racial minorities. Notwithstanding these efforts, racial discrimination is still prevalent in many multi-racial societies.

The persistence of discrimination in modern societies is not necessarily due to the reluctance of state officials to abolish it. In a large measure it is explained by the fact that racial prejudice and

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118. International Commission of Jurists, *Tibet and the Peoples Republic of China* (1960), 167-206.

the consequent discrimination are integral parts of the culture in such societies.<sup>119</sup> The different races in these cultures have assumed or been attributed definite roles in the social structure over time. Thus the race relations generally reflect the socio-economic positions of the different races in such societies.<sup>120</sup>

Racial discrimination is consequently a phenomenon that can hardly be eliminated through legislation. At best, international conventions and municipal enactment may only be evidence of official disapproval and prohibition. The plight of Australian Aborigines, the unusual case of the Untouchables of India,<sup>121</sup> the question of the Blacks in Brazil<sup>122</sup> and in the United States and the issue of American Indians<sup>123</sup> suggest that conventions and legislations can hardly change negative racial beliefs and prejudicial practices entrenched in the culture of a society.

What then is the best remedy for a group that faces racial discrimination? As noted earlier, the existence of racial discrimination in itself presupposes the intermingling and diffusion of races. Thus a racial group that faces even officially endorsed discrimination can hardly lay claim to a distinct territory that may be necessary for a remedial separatist action.

International law does not forbid a diffused group from claiming a distinct territory to which it could be confined for the purposes of

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119. See the analysis by Dzidzinyon, *The Position of Blacks in Brazilian Society*, M.R.G. Report No. 7.

120. *Ibid.*

121. Hiro, *The Untouchables of India*, MRG Report No. 26 (1982). See generally also Mahar (ed.), *The Untouchables in Contemporary India* (1972); Joshi, *Democracy in Search of Equality, Untouchable Politics and Indian Social Change* (1982); "Whose Law, Whose Order: 'Untouchables', Social Violence and the State in India," *Asian Survey* (July 1982).

122. Note 119.

123. See generally Wilson, *The Original Americans*; MRG Report 31 (1980). Josephy, *Red Power, American Indians Fight for Freedom* (1971).

secessionist self-determination. However, it is very doubtful whether in practical terms United States' Blacks, or the Australian Aborigines could successfully claim portions of territory for secession.

Secessionist self-determination is consequently not a practical solution for racial discrimination. It is therefore recommended that self-determination for claimant groups in this category ought to take the following pragmatic forms:

1. The right to reverse discrimination in education, job opportunities and general economic and social benefits. Such a situation could help the members of the race or ethnic group to foster a break from their inferior defined positions in the social structure and assume equal social and economic roles in the society.
2. The right to establish public funded autonomous ethnic institutions to pursue the rights and welfare of group members.
3. The right to community education and orientation to lessen and help remove community prejudices against the group.
4. The right to adequate and proportional representation on national bodies and the recognition of ethnic and cultural values of the group.

In empirical terms, it has been noted that Australia<sup>124</sup> and the United States<sup>125</sup> have already adopted some of these methods in dealing with their racial problems. The claim categories indicate that a separatist claim founded on racial discrimination is basically a demand for social, political and economic equality. The implementation of these recommendations would help meet the demands of such claimants.

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124. Page 235, *supra*.

125. Page 229, *supra*.



4. Where the issue of Self-Determination was not Settled Before the Withdrawal of the Colonial Power

The withdrawal of a colonial power from a territory may not necessarily mean that the latter has exercised its right to self-determination. In fact, in some instances, the end of colonialism could mark the beginning of contesting claims in or over the territory. Western Sahara,<sup>126</sup> West Irian,<sup>127</sup> and East Timor<sup>128</sup> are examples of such cases.

It is recommended that where the issue of self-determination was not settled before the withdrawal of the colonial power, and a territory is subsequently incorporated by another state, a claim to self-determination by the incorporated territory ought to be considered legitimate. This recommendation is consistent with the general United Nations' practice and prescriptions on integration.<sup>129</sup> It also accords with the position of the General Assembly in respect of all three examples. However, it must be pointed out that it was only in the case of West Irian that the General Assembly directives on the application of self-determination were followed.<sup>130</sup>

We have noted earlier that Indonesia and Morocco did not comply with the Assembly's prescriptions on East Timor and Western Sahara respectively. However, this in itself does not derogate from the desirability of using self-determination to resolve the type of disputes involved in such cases. Furthermore the persistent incorporation of the territories does not affect the legitimacy of the claims made.

For our purposes, the continued General Assembly support for the claims of the East Timorese, and the generally positive African response to the demands of Western Sahara suggest that there is a great likelihood of international support for self-determination

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126. Pages 89-90, *supra*.

129. Page 63, *supra*.

127. Page 69, *supra*,

130. Pages 66-68, *supra*.

128. Pages 81-85, *supra*.

in the case of separatist claims founded on similar circumstances.

5. Where the Territory is a Subject of Dispute, the Settlement of which involves the Possible Transfer of it with its Population to a State other than the Controlling State.

Jean-Jacques Rousseau wrote: "It is to make fools of people to tell them seriously that one can at one's pleasure transfer peoples from master to master like herds of cattle without consulting their interests or their wishes".<sup>131</sup> In the WWI period a similar view was adopted in the Wilsonian approach to self-determination which provided the fundamental basis of the post-war plebiscites for territorial settlements.<sup>132</sup> It has been indicated earlier that despite the enthusiasm and support for the principle, the settlements did not follow the wishes of the affected populations in every case. This latter contributed to the tensions that led to WWII.

In modern times, it is still possible to have a territorial dispute the settlement of which may involve the transfer of the affected territory with its population to a state other than the controlling state. Examples of such cases are Djibouti and Belize before their independence, Gibraltar and the Falklands (Malvinas), Kashmir and the Ogaden. In these types of disputes, it is recommended that self-determination as exercised through a free choice of the affected population, in a plebiscite or referendum, could be of great value for a lasting settlement. The recommendation can be considered in relation to specific cases:

#### Djibouti

Self-determination was adopted as a solution in the case of Djibouti (formerly the French colony of the Afars and the Issas).

131. Rousseau, *J. Political Writings* (Vaughan (ed.), 1915), 340-341, quoted in Suzuki, *op.cit.*, note 74, 827.

132. Page 7.

Ethiopia and Somalia had originally laid claims to the territory under French colonial administration.<sup>133</sup> These claims notwithstanding, the General Assembly affirmed the territory's inalienable right to self-determination in several resolutions,<sup>134</sup> and later called on the contesting states to "renounce forthwith any and all claims to the territory and to declare null and void any and all acts asserting such claims".<sup>135</sup>

For its part, Somalia renounced all its claims and declared its support for the self-determination of peoples divided against their will to strive for unity.<sup>136</sup> The Somali action was based on the hope that in the event of a free choice, the territory, particularly the Issas, would vote to unite with it.<sup>137</sup> Ethiopia also conceded that the future of the territory must be decided by the free choice of the people themselves.<sup>138</sup> Following a referendum in 1976, the territory opted for independence. In 1977, it emerged as a sovereign state and was subsequently admitted to the United Nations.<sup>139</sup> The Ethiopia-Somali dispute was thus resolved insofar as the territory of the Afars and the Issas was concerned.<sup>140</sup>

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133. The territory's population comprises the two dominant tribal groups of the Afars and the Issas. The Issas are Somalis. The Afars have ethnic bonds with tribal kinsmen in Ethiopia.

134. G.A. Res 2228 (1966); G.A. Res. 2356 (1967); G.A. Res. 3480 (1975).

135. G.A. Res. 3480 (1975).

136. Report of the U.N. Special Committee, 25 U.N. G.A.O.R. Supp. 23, 61 U.N. Doc. A/8023/Rev.1 (1970).

137. The Somali attitude was consistent with its basic position on the Ogaden and the NFD where it hopes that the Somali tribesmen would vote for a Greater Somalia if allowed to exercise self-determination. See page 268, *supra*. Sureda, 70, particularly note 25.

138. Report of the U.N. Special Committee, U.N. Doc. A/10023/Add 1, Chapter 8, Annex B (1975), 11.

139. G.A. Res. 32/1 (1977).

140. On the Djibouti question see generally Franck and Hoffman, "The Right of Self-Determination in Very Small Places", NYUJILP, Vol.8 (1975-76), 331, 351-357.

### Belize

The dispute over pre-independence Belize between the United Kingdom and Guatemala has been discussed elsewhere in the work.<sup>141</sup> It is sufficient to note here that the principle of self-determination provided a useful solution. Admittedly, Belize and Djibouti were colonies. So the use of self-determination in either case was consistent with the general pre-eminence of the application of the principle in issues of decolonization.<sup>142</sup> To this extent, Belize and Djibouti belong in a different category. Nevertheless, the resolution of the disputes, particularly that of Belize provides significant lessons for the settlement of the problems over Gibraltar and the Falklands.

A significant feature of the Belize settlement was that even though the territory exercised self-determination, the claims of Guatemala were not totally extinguished. Under a special accord entitled "Heads of Agreement"<sup>143</sup> Guatemala was awarded special concessions in respect of its claims. Under Article 1 of the agreement, Guatemala and the United Kingdom recognized the sovereignty of Belize. However, under Article 4 Guatemala was allowed free port facilities in the Port of Belize and Punta Crorda. In Article 24, Guatemala was also granted "such territorial sea area as shall ensure permanent and unimpeded access to the high seas". Belize and Guatemala agreed to exploit jointly the sea bed and the continental shelf off the coast of Belize, and to engage in other joint development projects of mutual concern. The concessions in the Heads of Agreement operate without prejudice to the rights and interests of Belize or its people. In effect, the agreement was not supposed to derogate from the

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141. Pages 86-89, *supra*.

142. Pages 79-80, *supra*.

143. Heads of Agreement (Great Britain - Guatemala), March 1981, H.C. Parl. Deb. 1, (6th Ser) (1981), 206. See also Va. Journ. Int'l. L., Vol. 22 (1982), 880-881.

sovereignty of the territory.

The Belize experiment is unique. The agreement fulfils the functional role of satisfying the demands of the residents of Belize while still maintaining aspects of the Guatemalan claims. It provides self-determination for the peoples of the disputed territory on the one hand, and ensures prospects of a lasting settlement between the contesting parties.

### The Falklands and Gibraltar

We have already discussed the issues of Gibraltar and the Falklands and indicated that the General Assembly is reluctant to support self-determination in either case.<sup>144</sup> We have also noted that from the Assembly's point of view what is at issue in the disputes over both territories is not whether the "plantations" have a right to self-determination, but rather who has title to the territories on which the plantations are resident. The disputes over the territories still remain. Disagreements between the United Kingdom and Argentina resulted in the Falklands War of 1982 with all its implications for international peace and security.<sup>145</sup> In the case of Gibraltar, it has been suggested that there are prospects for a similar confrontation between Spain and the United Kingdom and that the situation may have been saved at least for the time being by Spain's interest in NATO and the European Community.<sup>146</sup>

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144. Pages 94-95, *supra*.

145. See note 51 of Chapter Three. For recent works on the Falklands issue see Franck, "Dulie et Decorum Est: The Strategic Role of Legal Principles in the Falklands War", A.J.I.L., Vol. 77 (1983), 109-124; Perl, "The Falklands Dispute" in *International Law and Politics: A Documentary Source Book* (1983); Greig, "Sovereignty and the Falkland Island Crisis", Australian Yearbook of Int'l.L., Vol. 8 (1982), 20.

146. Perl, *id.* The concern of the U.K. for the interests of the Falkland Islanders differs greatly from that towards the British subjects who are indigenous inhabitants of Indian Ocean Islands of Diego Garcia. For a revealing discussion of the U.K.'s double standards in relation to the territory see Madeley, *Diego Garcia: A Contrast to the Falklands*, M.R.G. Report No. 54 (1982).

Despite the military defeat of Argentina over the Falklands and the apparent cordial relationship between Spain and the United Kingdom today, the Falklands and Gibraltar disputes remain potential threats to world peace and security. Notwithstanding the General Assembly's negative stand, it is submitted that the principle of self-determination (albeit applied in qualified terms) offers the only prospect of a lasting settlement for the two disputes. It seems clear that the United Kingdom does not seek territorial aggrandizement in either the Falklands or Gibraltar. The United Kingdom is more concerned with the protection of the interests and wishes of the residents<sup>147</sup> In view of this, an arrangement similar to the Heads of Agreement in the Belize case would be a useful compromise. Spain and Gibraltar as claimant states, could be awarded sovereignty over the territories, while the residents are allowed to exercise self-determination through the establishment of autonomous political and economic institutions.

#### Kashmir, the Ogaden and the NFD

The cases discussed in the foregoing sections involve disputes that have arisen in the process of decolonization. Nevertheless, for our purposes, they provide the basis for a vital prescription: wherever the resolution of a territorial dispute involves possible changes in national or sovereign allegiance, and group identification, any settlement ought to include an act of free choice by the affected population.

It has been indicated in the claim categories that in Kashmir, the Ogaden and the NFD in Kenya, the controlling states have persistently rejected the application of self-determination to the extent that it implies the cession of the territories. It is correct to say that what is rejected is not the principle of self-determination

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147. Franck and Hoffman, *op.cit.*, note 140, 378-79.

*per se* but any settlement that involves secession. In the event of any negotiated settlement that allows for cession, it is recommended that the free choice of the affected populations must ultimately determine where any lasting boundaries must be drawn.

In Africa, Asia and Latin America where boundary and other territorial disputes are prevalent, the application of self-determination in such issues could be very useful. The expressed wishes of a people affected by a settlement, as to their preferred national allegiance, could help to reduce the incidence of separatist activity.

#### 6. The Recovery of Occupied Territory

A classic example of this form of dispute is the Palestinian Question. We have indicated earlier that Palestine is under Israeli military occupation and that Palestinian refugees are arguably a displaced people.<sup>148</sup> For all practical purposes Palestine is an occupied territory and appears to be the only one of its kind in modern times.<sup>149</sup>

In the case of a people in the Palestinian situation, there is little remedy in the current international system. A detailed examination of the status of occupation in international law is beyond the scope of this work. It is sufficient to note that modern international law does not approve of forceful territorial occupation. Nevertheless, it recognizes the fact of occupation and thus attempts to regulate the conduct of the occupying power under the Fourth Geneva Convention. The convention ensures the proper treatment of the resident population in cases of occupation. However, it does not provide a remedy against occupation.<sup>150</sup>

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148. Pages 273-274, *supra*.

149. It has been suggested that Israel is a "lawful occupant" of those territories and that it is "entitled to remain in control ... of the (territories) involved pending negotiations of a treaty of peace". Stone, *Israel and Palestine: Assault on the Law of Nations* (1981), 51.

150. Before the Fourth Geneva Convention, occupation was generally regulated under the Hague Regulations of 1907, Articles 42-56.  
(contd)

By its very nature, an occupation raises a *prima facie* case of a denial of self-determination and a subsequent need to redress the situation. It is therefore recommended that the principle must constitute the fundamental basis of any settlement of a dispute founded on illegal occupation. In such cases, the right to self-determination would mean the right of a people to live on their territorial homeland and to create an independent state free from foreign domination. To the extent that occupation involves foreign control, the application of self-determination to such disputes would be consistent with the role of the principle as protection against alien domination and exploitation. The recommendation is also consistent with the approach of the General Assembly to the Palestinian Question.<sup>151</sup>

7. Where a Claim is Founded on a *Bona Fide* Case of Absence of Consent for Territorial Association

It has been noted in Chapter Three that freedom of consent is an essential element of self-determination.<sup>152</sup> We have also indicated that in the practice of the General Assembly, the free consent of a people could be overlooked in some cases in the interest of peace and security.<sup>153</sup> With the exception of such special situations, it has been noted that a territorial association not founded on free consent

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150. (contd) After WWII, The Hague Regulations were supplemented and re-stated in the Fourth Geneva Convention of 1949. Under the latter, the inhabitants of an occupied territory have the following protections: Article 47, provision of public order and safety by occupant to inhabitants; Article 49, prohibition of deportation or transfer of the civilian inhabitants from the occupied territory; Article 53, the prohibition of the destruction of real or personal property belonging to persons or organizations in the occupied territory except where such destruction is rendered absolutely necessary by military operations. The Convention also provides that inhabitants shall not be punished for offences they did not personally commit and that collective punishment is unlawful. Pillage and reprisals against the inhabitants are also prohibited under Article 33.

151. See note 220 of Chapter Six, page 275, *supra*.

152. Note 77, *supra*.

153. Pages 94-102, *supra*.



is *prima facie* illegal and would be rejected by the General Assembly.<sup>154</sup> It is therefore recommended that where a claim is founded on absence of consent for territorial association it ought to be considered legitimate and admissible.

Such a prescription is in conformity with the practice of the General Assembly and takes account of the prerequisites or a valid act of self-determination. The prescription would favour the claims of Eritrea. It is however, not clear if it would support the demands of the Baltic States. This is because in 1939, when the states joined the Soviet Union, international law did not recognize a right of self-determination. On the basis of inter-temporal law, it is doubtful whether the modern legal right of self-determination could be applied to the Baltics.<sup>155</sup> This is, of course, without prejudice to the issue as to whether they are entitled to some other form of remedy in international law.

#### INADMISSIBLE CLAIMS TO SELF-DETERMINATION IN THE POST-COLONIAL CONTEXT

Under this heading, it is proposed to suggest separatist claims which ought not be admissible in international law. In discussing admissible claims, we indicated that a claim ought to be admissible only insofar as it was consistent with our specified community goals. For each admissible case one sees that there is a relationship between the type of claim and a given norm of international law

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154. Page 85, *supra*.

155. It is tempting to raise similar doubts about the application of self-determination to Namibia. However, one must note that the two cases are distinguishable. See the views expressed by Tanaka in the *South West Africa Case*, I.C.J. Rep. (1966), 293-94. On the Baltics, see however a different argument suggested by Meissner, "The Right of Self-Determination After Helsinki and its Significance for the Baltics", *Case W.Res.Journ.Int'l.L.*, Vol. 13 (1981), 375-384, particularly 381-384.

or practice. Where a claim does not exhibit this relationship it ought to be inadmissible. It is important to note that the emphasis is on admissibility in international law as such. As indicated in the claim categories, some separatist demands are confined to the municipal process and are best resolved therein. Some, in any case, have little or no relevance to international law. The prescriptions under this heading only relate to the claims insofar as international law is concerned. They do not purport to prejudice the legitimacy of such claims in respect of municipal political or legal systems.

1. Claims Based on Disparities in the Distribution of Wealth and Power

In recent times, it has been argued that where unequal distribution of wealth and power is perpetrated between the regions of a state as a result of internal colonialism, a separatist claim ought to be legitimate in international law.<sup>156</sup> In the author's opinion, it is hard to agree with this contention. Disparities in regional development and access to national wealth and power are present in many states. This fact does not make such disparities desirable nor excusable. It is however, doubtful whether the remedies for such problems could be sought under international law.

Admittedly, the United Nations Covenant on Social, Economic and Cultural Rights prohibits economic discrimination. However, disparities

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156. Sornarajah, "Internal Colonialism and Humanitarian Intervention", Ga.Journ.Int'l.Comp.Law (1981), 45-77. See also the arguments of Carey, "Self-Determination in the Post-Colonial Era: The Case of Quebec", A.S.I.L.S. Int'l.L.Journ., Vol. 1, 47071, 65-68; Nayar, "Self-Determination: The Bangladesh Experience", Revue des Droits de L'homme, Vol. 7 (1974), 231-271, 232-233.

in wealth distribution do not necessarily imply a policy of discrimination. The cases of Quebec and the Southern Sudan suggest that such disparities are usually the results of a peculiar pattern of historical evolution in a given state. They are not the consequences of a deliberate governmental act of deprivation. They are usually the results of defective state economic planning. It is very doubtful whether the United Nations Covenant can be stretched to cover such situations particularly in the absence of an intentional act of the state to deprive a region of its share in the national cake. Similarly, a relatively rich region of a state cannot rely on the provisions of the Covenant or any other international law norms to sustain a claim based on the unequal distribution of social burdens in the community.<sup>157</sup>

The prescriptions would therefore not favour the admission of the claims by the Southern Sudan, Quebec and Katanga insofar as disparities in the distribution of national wealth and power are concerned. In the author's opinion, economic planning and the distribution of power in a state are domestic issues and remain so, insofar as they do not contravene any norms of international law.<sup>158</sup>

Apart from the peculiar case of Katanga, empirical evidence suggests that claims in this category are confined to the municipal process. It is quite certain that sovereign states would not admit external interference in their domestic economic planning or methods of regional wealth and power distribution. It is therefore recommended that claims founded on disparities in distribution of rational resources could best be resolved within the municipal process and should be

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157. Suzuki, *op.cit.*, note 49, 862.

158. This is consistent with the notion that a state's sovereignty over its domestic affairs is not absolute and that its municipal acts have to be seen in the light of its international obligations and generally accepted standards of international custom (*Nationality Decrees in Tunis and Morocco*, P.C.I.J., Ser.B No. 4 (1923), 24); See also Brownlie, *Principles*, 290-291.

confined to the latter.

## 2. Claims Founded on Religious Differences

The separation between India and Pakistan is so far the only case of a successful separatist demand based on religion since 1945. However, this was effected on the eve of independence and does not constitute a post-colonial case. In contemporary times it is difficult to sustain a separatist claim based on religion. With very few exceptions religious affiliations do not usually coincide with ethnicity.<sup>159</sup> Even if they do coincide, the groups concerned may be diffused in the state. They may therefore not have the territorial base required for separatism.\* It is thus not practical to admit separation on the basis of religious differences.

Most states in which one finds separatism based on religion are secular. Thus, cases of religious intolerance may not necessarily be state-sponsored. Within our policy prescription, self-determination ought to operate as a sanctioning institution to protect and promote the human rights of the individuals. Admittedly, freedom of religion is considered a human right and is included in the United Nations Covenant. However, when such rights are violated by private individuals as opposed to the state, remedial action must lie against the individual culprit within the framework of municipal law. The international reaction to the Northern Ireland case so far would seem to suggest that such issues are generally considered domestic.

The case could differ where a state fails to provide protection through the domestic legal system or where it sponsors religious discrimination or suppression. In any event, the state's

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159. The exceptions would include the Moros of the Philippines, the non-Islamic groups of Southern Sudan, and the mostly Islamic Palestinian Arabs and the Karens of Burma.

\* Sikh separatists in the Indian State of Punjab could be an exception.

conduct would be open to question under international law.

This notwithstanding, it would still be impractical to recommend separation where the claimant group is diffused in the community.

The most appropriate solution would be some other forms of human rights protection, constitutional guarantees and remedies on the basis of the prescriptions recommended for cases of racial discrimination.<sup>160</sup>

### 3. An Historical or Continuing Tradition of Autonomy

With the possible exception of demands based on specific international treaties,<sup>161</sup> international law has little or no immediate relevance to such claims. There is no international law rule that provides that because a group was autonomous in medieval times it should be autonomous today. In any event, cases in the claim categories indicate that such claims are confined to the domestic system.

The cases of the Croatians, the Basques and the Catalans suggest that the domestic constitutional remedies adopted to meet the demands of the groups in this category have been very satisfactory. It is therefore recommended that separatist claims founded on an historical or continuing tradition of autonomy ought not be admissible in international law since the municipal legal system provides effective remedies for the resolution of such claims.

### CONCLUSION

Any prescriptions on self-determination within the post-colonial context must necessarily take account of the opposing demands of state sovereignty and the need to protect the rights of the claimants. The prescriptions must represent a delicate balance between such demands. For this reason, claims founded on matters which are traditionally

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160. Page 324 , *supra*.

161. An example of such claims is the case of the South Tyrol of Italy.

within the domestic jurisdiction of states are not the appropriate concern of international law and must therefore be left within the municipal regime. This is because states are most likely to reject any prescriptions that may amount to intrusions or interventions in their internal affairs. Conversely, claims must be admitted only where they are founded on issues which are generally considered to be of international concern. On this premise, it is recommended that in the post-colonial context, self-determination must be used for certain specific community goals, i.e. the protection of a certain category of human rights and the peaceful resolution of certain types of territorial conflicts. A claim ought to be admissible wherever it promises to promote these goals. The scheme would thus favour claims based on genocide, cultural genocide and racial discrimination. For the settlement of territorial disputes, the scheme would admit claims founded on illegal annexation or occupation, a *bona fide* case of absence of consent for association or where the territory is the subject of a dispute the settlement of which involves a possible transfer of its people to a state other than the state controlling it.

In admitting or supporting claims, the interests of the claimants must be balanced with the interests of the parent states and requirements of world order and existing norms of international law. It was therefore, noted in the latter part of this Chapter (page 294) that on their own the two identified community goals, i.e. the protection of human rights and the peaceful settlement of territorial disputes, are not sufficient parameters for the determination of a community policy on post-colonial self-determination. For a sound policy basis, these goals must be considered along with a set of substantive criteria that take account of the demands of existing

international law, world order and the interests of the present communities. In the next chapter it is intended to discuss these criteria.

## CHAPTER EIGHT

### RECOMMENDED SUBSTANTIVE CONDITIONS

#### FOR SUPPORTING CLAIMS.

In the previous chapter, it was indicated that where there is a breach of a minimum standard of human rights, a *prima facie* case exists for the application of self-determination. We also noted that the principle could be used to resolve certain types of territorial disputes. However, the question remains as to whether every group that establishes a *prima facie* case should necessarily be granted the right. The general view is that the admissibility of a claim must be subject to a set of definite conditions relating to world order, existing international law norms and the rights of the parent states. It has therefore been suggested that to admit a claim, we must take account of the following:

Have the people historically constituted a nation?  
Do they share a common ethnic, religious or linguistic identity? Are the old and new entities economically viable? Do the people live within a common geographic area? Do they share common institutions or political authority or common awareness as a people?

Cases of peoples that have exercised the right to self-determination since 1945 tend to make the sociological and linguistic requirements of this approach unacceptable. In the decolonization process the U.N. used sociological and linguistic factors in very exceptional cases.<sup>2</sup> There is therefore no reason to suggest that the requirements for post-colonial self-determination should be any different.

1. Mensah, *Self-Determination Under the Auspices of the United Nations*, Ph.D. Dissertation, Yale Law School (1963), cited in Friedlander, "Self-Determination: A Legal Political Enquiry" in Yona *et al.* (eds), *Self-Determination: National Regional and Global Dimensions* (1980), 315. Mensah's view is supported by a number of authorities, see note 1 of Chapter Seven.
2. The division between Rwanda-Urundi into Burundi and Rwanda on an  
(contd)



Johnson and Singh have suggested an alternative standard.<sup>3</sup> They argue that internationally, self-determination has been claimed for groups which the international community has been willing to recognize as nations. The latter have been defined by their potential to become independent, measured by factors more relevant to *statehood*. Thus a people may be considered suitable for self-determination if it is eligible for statehood.<sup>4</sup> This approach fails to provide any specific information on the factors one may use as the basis for admitting claims. Furthermore, the potential to be independent may not be relevant for territories that wish to exercise self-determination by integration or association. Since the resolution of some territorial disputes may result in integration, this approach may also not be relevant to some groups exercising self-determination as part of a territorial settlement.

Johnson and Singh's suggestion nevertheless provides a basis on which one can examine in detail some of the factors relevant to statehood and which can be used as part of the basis for admitting claims.

#### POPULATION

A claim to self-determination is a group demand. The existence of an identifiable claimant group is therefore central to the claim. A basic prerequisite for group formation is a determinate population. It is hardly possible to imagine the application of self-determination to a territory without a population. The population factor is consequently imperative to the exercise of self-determination in any context.

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2. (contd) ethnic basis, the partition of the Indian subcontinent in India and Pakistan on religious lines and the partition of Palestine are the few exceptions.

3. Johnson & Singh, "Self-Determination and World Order" in Yona *et al.*, *op.cit.*, note 1, 350.

4. *Ibid.* See also the views of Kaur that "self-determination for a nation leads to a natural and strong tendency for the nation in question to seek to create for itself a state." ("Self-Determination in International Law", I.J.I.L., Vol.10 (1970), 439).

In the creation of a state there seems to be no prescribed minimum limit for the number of persons in the population.<sup>5</sup> Similarly, in all known cases of self-determination grants, there has never been a requirement for a minimum limit to constitute a valid population. It is therefore right to suggest that, for the purposes of post-colonial self-determination, a population so established ought not be subject to any numerical limit.

#### Permanence

A claimant group must however show evidence of a permanent population to be eligible for the right. The emphasis here is on the permanence as such, of the population. A permanent population relates to persons who are habitually resident in the territory. This view is consistent with the requirements for statehood.<sup>6</sup> The issue of permanence is of great significance particularly to secessionist groups, since a permanent population is evidence of one of the prerequisites of statehood.<sup>7</sup> It is also an essential factor when applying self-determination to territorial disputes. It could help to distinguish *bona fide* permanent residents from temporary residents who may be artificially established on a territory just for the purposes of influencing any self-determination process.

The essence of this requirement was demonstrated in the case of Gibraltar. Until the 1969 Spanish blockade, a considerable number of Spaniards used to go to work in Gibraltar from Spain. During WWI when 16,700 of the 18,000 permanent residents of Gibraltar were

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5. Crawford, 40.

6. *Ibid.*

7. For other elements in the creation of states see *id.*, 31-74; "The Criteria For Statehood in International Law", B.Y.I.L. (1975-76), 93-183, 111-140. See also an interesting sociological and legal comparative analysis of the attributes of statehood by Johnson and Rosberg, "Why African Weak States Persist, The Empirical and the Juridical in Statehood", World Politics, Vol. 35 (1982), 1-28.

evacuated, it is estimated that 13,000 Spaniards used to go to work daily in Gibraltar. It was thus argued by Spain that during those years the Spanish workers were the real population of Gibraltar. More significantly, Spain maintained that the workers "were truly the other Gibraltar population whom nobody mentions, of whom nothing is said, when the future of the rock is discussed".<sup>8</sup> The British rejected this argument.

With regard to a displaced people seeking to recover an occupied territory, the requirement for a permanent population may be unnecessary. The very nature of the occupation with the consequences of displacement could preclude permanent residence on a territory. For instance in the case of the Palestinians, a substantial number of the population has not been resident in the Israeli occupied territory since 1948.<sup>9</sup> It would therefore be unrealistic to argue that the Palestinians are not eligible for self-determination.

However, the fact of displacement presupposes previous residence. This is demonstrated in the case of the Palestinians who were formerly resident in the West Bank and Gaza area. It is therefore suggested that in the case of a displaced claimant group, there must be evidence of a previous permanent residence on the territory claimed.<sup>10</sup>

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8. *Negotiations on Gibraltar*, Madrid (1969), 366-367.

9. Statistics on Palestinians living outside Palestine are as follows: Out of a total of 3 million, 240,000 lived in Lebanon before the Israeli invasion of Beirut in 1982, 155,000 in Syria, 140,000 in Kuwait and 33,000 in Egypt. 20,000 more live in Saudi Arabia, 15,000 in the Gulf Region, 14,000 in Iraq and a further 5,000 in Libya. Outside the Middle East, 15,000 live in West Germany, 7,000 in the United States and 5,000 in Latin America. About a million still live in Israel-occupied Palestine and 900,000 in East Jordan. (*The Palestinians*, MRG Report No 24 (1982 ed.), 3.)

10. This would exclude the case of the Jews before the creation of the state of Israel unless one takes account of the biblical link between them and the land of Palestine. Before the exodus of the Jews to Palestine, they did not lay claim to a disputed territory as such. They were not a displaced people whose territory

(contd)

### An Identifiable "Self"

Self-determination is the prerogative of peoples or 'selves' or self-determination units. When a group claims the right, it presupposes that it is a "self". The existence of a determination population may not necessarily mean there is such an identifiable "self". There must therefore be some evidence of an extant self making the claim. In the colonial context, the colonized residents of a territory were regarded as the "self" or the primary unit eligible for self-determination. In the post-colonial context, there is no generally accepted formula for identifying self-determination units. Buchheit however suggests that a "reasonable showing of distinctiveness" may be appropriate.<sup>11</sup> The difficulty with his suggestion is that what amounts to a "reasonable...distinctiveness" is very subjective and quite ambiguous. One needs a more specific basis for identification. It is therefore submitted that in the post-colonial context, where self-determination is applied to protect the minimum content of human rights, the "self" could be identified as the group against whom violations are committed or being committed. In the case of territorial disputes, the "self"

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10. (contd) was under illegal occupation in the sense that the Palestinians find themselves today. It is therefore not surprising that the Jews did not lay claim to recover any specific territory for a considerable period in their quest for a homeland. Theodore Herzl *proposed* an Israeli homeland in Palestine or Argentina in his thesis: *The Jewish State*. The British also proposed the colony of Uganda to which the Jewish community even sent representatives to make preliminary investigations (see generally Taylor, *Prelude to Zionist Diplomacy, 1897-1947* (1959), 3-7).

The biblical and historical links between the Jews and Palestine may perhaps be said to be evidence of previous residence on the territory. However the validity of this argument is doubtful in international law considering the period of absence of the bulk of the Jews from Palestine and other historic events during that period. For a brief but detailed historic account on Palestine, see Lewis, "Palestine: On the History and Geography of a Name", *Int.Hist.Review*, Vol. 2 (1980), 1-12; See also the view on the claims to the territory in Cattani, *Palestine and International Law* (1973). For a different view on the issue see, Stone, *Israel and Palestine: Assault on the Law of Nations* (1981), 9-18.

11. Buchheit, *Secession*, 229.

could be the group which is affected directly by the settlement.

In identifying the distinct "self" linguistic, cultural, religious or ethnic homogeneity may provide *prima facie* evidence of group cohesion and identity. However, these elements are not dispositive and are thus of relative importance.<sup>12</sup> The identification of the "self" may therefore depend more on the existence of a subjective psychological element as may be evidenced by a demonstrated associational desire among the members of the group. In the author's opinion this criterion takes precedence over sociological or historical elements.<sup>13</sup> This view is consistent with the U.N. practice of recognizing colonial territories as self-determination units irrespective of sociological or linguistic heterogeneity. In any case, since linguistic or cultural homogeneity is not necessarily a requirement for statehood<sup>14</sup> there is little reason to suggest that separatist groups ought to be culturally homogeneous to be eligible for self-determination.

The Express Wishes of the Claimant Group Must be Definite and Ascertainable

When a group demands self-determination the prevailing wishes of the members cannot be assumed to be uniform.<sup>15</sup> In the case of secessionist groups "the demand for secession may or may not be widely shared by many in the population of the territory. The degree of support where carefully observed may be confined only to an outspoken elite or may extend to the rank and file of the population. While components of a group may demand a new entity others may oppose this".<sup>16</sup>

12. "The Logic of Secession", Yale Law Rev., Vol. 89, 817.

13. Suzuki, "Self-Determination", Va.Journ.Int'l.L., Vol.16, 786-87.

14. Note 7.

15. Lung Chu-Chen, "Self-Determination as a Human Right", in Reisman and Weston (eds), *Towards World Order and Human Dignity* (1976), 206.

16. *Ibid.*

Similarly, in the case of a group affected by a territorial dispute, the various members may have different ideas as to their preferred national allegiance. In the issue of the Palestinians for instance, some members have suggested an integration into Jordan while others have proposed the creation of a mini-state in association with Jordan. The P.L.O. however sees the creation of a democratic independent Palestinian state as the ultimate solution.<sup>17</sup>

In each claim it is therefore necessary to ascertain the expressed wishes of the members of the claimant group. The form of self-determination desired must reflect the popular will as represented by the majority.

Ideally, a plebiscite or referendum would be the best means of determining popular will. It could help to give a clear indication of the group's demand. It further offers advantages to the state itself and to claimant groups. It could help the state to reassert its authority and diffuse secessionist claims where a majority votes to remain with the state.<sup>18</sup> In the case of West Irian the vote to remain residents to be part of Indonesia helped to diffuse the Dutch-Indonesian dispute over the territory and reasserted Indonesian authority.<sup>19</sup> For claimant groups, a majority decision for separatism could help generate international support.

In both Bangladesh and Biafra there were no formal referenda on secession.<sup>20</sup> However, given the chaotic situation of massacres it

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17. See generally Smith, *op.cit.*, note 9, 13-15.

18. "The Logic of Secession", *op.cit.*, note 12, 803-804.

19. See pages 66-68, *supra*. The referendum was held in 1969. See also G.A. Res. 1752 (XVI). In recent times however the authority of Indonesia has come under increasing challenge from the Irianese. See note 136 of chapter Two.

20. In the case of Bangladesh, perhaps it could be argued that Shiekh Rahman's Awami League had won every seat in the region in the elections prior to the crisis and that the elections were contested on the pro-autonomy Six Point Programme. However, it must be  
(contd)

would have been unrealistic to demand formal consultations. Biafra and Bangladesh suggest that in most situations the requirement for a referendum is impractical despite its obvious advantages.

However, where conditions favour a referendum, it is best organized with the assistance of an impartial third party. This is particularly so in relation to the settlement of territorial disputes. In the colonial context, the United Nations supervised several plebiscites and consultation processes as part of the decolonization scheme.<sup>21</sup> In instances where there was no United Nations supervision, the results of the consultations were generally regarded as invalid.<sup>22</sup> Apart from decolonization cases, the U.N. was also invited to supervise the plebiscites in Sabah, Sarawak and Bahrain.<sup>23</sup> In the resolution of post-colonial self-determination disputes, the supervisory role of an impartial organization in a plebiscite can attest to the authenticity of group expression and preferences.<sup>24</sup>

#### TERRITORY

A defined territorial base is an essential requirement for the creation of a state.<sup>25</sup> In the case of secessionist claimant groups, a territorial base is thus very significant and in any case, a *sine*

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20. (contd) emphasized that secession was not an issue in the elections. The latter did not in any case constitute a referendum on the desirability of the secession of East Pakistan. In the view of at least one author, if the Awami League had indicated its intentions to secede, as the basis of its election campaign in 1970, it is doubtful whether it would have received any support from the grassroot levels in East Pakistan (Choudhury, *The Last Days of a United Pakistan* (1974), 137-137).

21. Such instances include the plebiscites in British Togoland, The British Camerouns and Cook Islands. See 99-101, 106-108 *supra*.

22. Pages 52-54, *supra*.

23. *Sureda*, 307.

24. Recent examples of such supervisory roles are the cases of the British Commonwealth involvement in Zimbabwe and the United Nations in Djibouti.

25. *Crawford*, 37.

*qua non*.<sup>26</sup> Apart from the fact that it is indispensable in establishing a separate entity, a territorial base provides the geographical basis which helps to distinguish the claimant group from others. It could also help to provide evidence of group identity and a basis for cohesion.<sup>27</sup>

For groups involved in territorial disputes, such a territorial requirement would be superfluous. The very nature of a territorial dispute implies the existence of a definite territory. With specific regard to displaced peoples, however, evidence of a previous territorial base is essential. The fact of displacement or forceful occupation presupposes the existence of a territory. Where a displaced group fails to identify a definite territorial area as the basis of their claim, their demand ought not to be honoured. To grant self-determination in such circumstances could involve the deprivation of the territory of other groups.<sup>28</sup>

Even though a territorial base is very essential, there is no minimum limit to the size of the area required. This proposition is consistent with the view that in the case of states in international law, "there appears to be no rule prescribing the minimum area of...territory".<sup>29</sup> Thus a state can occupy an extremely small area provided it is independent. The emergence of Nauru, Tonga, Lesotho and Vanuatu as states supports this. Since eligibility

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26. "Logic of Secession", *op.cit.*, note 12, 818; Buchheit, *Secession*, 229, "In a claim for secession, it seems inescapable that the claimant group must occupy a distinct territory".

27. "Logic of Secession", *ibid.*

28. If the Jews had been settled in Argentina or Uganda (see note 10 *supra*), this would have undisputably been the case. At their present location, the Palestinians argue that notwithstanding any biblical connections, Israel's present territorial possessions belong legally to Palestinian Arabs.

29. Oppenheim, *International Law* I (H. Lauterpacht (ed.), 1955), 451, "a state without territory is not possible although the necessary territory may be small"; Mendelson, "Diminutive States in the United Nations", *I.C.L.Q.*, Vol.21 (1972), 609-630, 611.



of secessionist groups and displaced peoples to exercise self-determination could be assessed in terms of their potentialities for statehood, the territorial requirements for states apply to such claimant groups.<sup>30</sup>

#### VIABILITY

The question of viability is often raised in relation to the size of the territory of the claimant group. It has been suggested that any territorial entity envisaged by the claimants must have the minimum basis necessary for it to become a viable and responsible "body politic" in the world community.<sup>31</sup> In support of this view Lung Chu-Chen argues that "in a world of ever increasing interdependence, a proper balance between freedom of choice and the viability of communities must be maintained".<sup>32</sup> He further argues that eligibility for self-determination must be assessed not only in terms of a group's potentialities to fulfil its international obligations but also in terms of its internal processes.<sup>33</sup>

Buchheit underscores the element of viability when he observes that the seceding entity "must of course be viable without its present governing state".<sup>34</sup> Proof of viability does not seem to be necessary in Buchheit's view in the case of a group that "avows

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30. Ofuatey Kojo observes that "concern...for the size of groups claiming...self-determination is not directly related to the right itself but to the problem of the possibility of creating a multiplicity of ministates and the problem their vulnerability might generate for the international community". Nevertheless, he admits that "in general, size has not been used...as a criterion for deciding the validity of a group's claim" (*The Principle of Self-Determination in International Law* (1977), 160). At worst, smallness may only affect sovereignty but it does not in itself detract from the sovereignty as such, (see Kohn, "The Sovereignty of Liechtenstein", A.J.I.L. Vol. 61, (1967), 54-47, 550).

31. Suzuki, *op.cit.*, note 13, 861.

32. Lung Chu-Chen, *op.cit.*, note 15, 211.

33. *Ibid.*

34. Buchheit, *Secession*, 231.

its intentions of uniting with an established viable state soon after separation".<sup>35</sup>

There could be two senses in which one can speak of the viability of a territorial entity, namely: territorial viability and economic viability. Let us examine each closely.

#### 1. Economic Viability

The territory of a state provides a source of identity for its people. The territory together with the people constitute the source of the polity's natural and manpower resources for economic growth and survival. It is therefore thought that where an entity controls too small a population and territory, its ability to meet its economic responsibilities could be questionable and it may not be viable. The logical extension of this thesis would seem to be that the territory and the claimant population must be big enough to ensure viability. It is only then that the group would be eligible for self-determination.

When is an entity too small to be economically viable? Opinions differ as to what constitutes a 'small entity'. As far back as 1938, Hitler was known to have asked: "What can words like independence or sovereignty mean to a state of only 6 million?"<sup>36</sup> In modern times, de Smith has suggested that an entity is small when its population is under 150,000.<sup>37</sup> Plischke however, suggests a population of 300,000 or less as the standard of classification.<sup>38</sup> Mendelson on the other hand puts the figure at 1 million or less<sup>39</sup> and receives support

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35. *Id.*, 230.

36. Adolf Hitler on Austria, quoted in de Smith, *Microstates and Micronesia* (1970), 19. Hereinafter cited as de Smith.

37. *Id.*, 5.

38. Plischke, *Microstates in World Affairs* (1977), preface. See also Blair, *The Ministate Dilemma* (1968).

39. Mendelson, *op.cit.*, note 29, *supra*, 609, note 1.

among other commentators.<sup>40</sup>

The various suggestions reflect the absence of any precise definitions of what constitute a small state and the difficulties inherent in formulating one. The essential factor in all the definitions suggested is the size of the population of the territory and not the latter's physical size. However, most entities that have been classified as small tend to have both small populations and small territories. In 1967 U Thant described small states as those:

which are exceptionally small in area, population and human and economic resources.<sup>41</sup>

His definition is more comprehensive than any other and seems preferable.

The opposition to post-colonial self-determination for small entities is based on the view that their potential national income and markets would be too small to permit any economy to function effectively or allow for normal economic growth.<sup>42</sup> Such entities would therefore have to be maintained through international charity. For an international system where foreign aid is already stretched to its limits, it might be prudent not to foster the proliferation of entities that may not be economically viable. An extension of this reasoning is that, without economic viability, an entity might not be able to engage in normal international relations, e.g. maintaining diplomatic missions.<sup>43</sup> Furthermore, such an entity could be militarily vulnerable, politically weak and a potential source of instability and possible super-power clashes.<sup>44</sup>

One finds it hard to accept the economic viability requirement

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40. See for instance UNITAR, *Status and Problems of Very Small States and Territories*, 1969, 22, 206-330 quoted *ibid*.

41. 22 U.N. G.A.O.R., Supp, 1A, at 20. U.N.Doc. A/6701/Add 1 (1968).

42. Leff, "Biafra, Bangladesh and Bigness Bias", *Foreign Policy* Vol. 49 (1971), 130.

43. See generally *Puerto Rico and the International Process* (1975).

44. See the critique of Nathaniel Leff, *op.cit.*, note 42, 129.

and its corresponding rationale in the light of existing norms of international law and actual cases. In international law, there is no rule that an entity must demonstrate a potential for economic viability to be eligible for self-determination or statehood. There is also no rule that requires an existing state to demonstrate economic viability once established. It is thus doubtful whether the requirement for economic viability for claimant groups can be justified on the basis of international law norms. In fact, Resolution 1514 seems to suggest that economic viability is not a necessary requirement for self-determination. Paragraph 3 of the Resolution provides that:

Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

Since the foregoing statement was made as part of the declaration on colonies, it is quite tempting to argue that it applies to only colonial cases and that it is not relevant to post-colonial claims to self-determination. Any such argument would be unacceptable. The statement has, at least, an indirect relevance to post-colonial cases. If it is possible to admit economically unprepared colonies to self-determination then it ought to be possible to admit an "economically unprepared" claimant territory to self-determination. The consequences if any, of admitting a territory in the colonial context would not be different from the implications of admitting a similar territory in the post-colonial context.

As Dov Ronen notes, one of the greatest lessons of decolonization is that "the size of a country and economic viability" are no prerequisites for the right to self-determination.<sup>45</sup> The existence of some of the poorest countries in the world enjoying all the rights of statehood and U.N. membership would seem to confirm this.

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45. Ronen, *The Quest for Self-Determination* (1979), 11.

Before 1960 the General Assembly appeared to favour the view that economic viability was an essential consideration in exercising self-determination. At least in one instance the Decolonization Committee indicated that it was desirable for certain small territories to unite with others in the same region to form viable economic and administrative units and that it was regrettable that such steps had not been taken.<sup>46</sup> The view of the committee was consistent with Principle VI of Resolution 1541 (XV). Even though the resolution makes no mention of the need for economic viability it provides for integration and association as legitimate methods of exercising self-determination. Impliedly, small entities could take advantage of this arrangement and thus ensure their economic viability.

After 1960, and particularly after 1965 however, the General Assembly has generally refused to accept any changes in the status of non-self-governing territories not involving complete independence.<sup>47</sup> The 1965 case of Cook Islands in association with New Zealand and the 1984 integration of the Cocos Island into Australia are so far the only exceptions to this rule up to date.<sup>48</sup> Even then, in these two cases, the territories were given the option of independent existence despite the fact that in the case of the Cocos Island there was a population of only 250. Generally, the Committee of 24 has acted as an international lobby for absolute independence regardless of the consequences.<sup>49</sup> Thus the current practice of the U.N. does not support the requirement of economic viability. In the author's opinion, the absence of a requirement of economic viability in the practice of the United

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46. A/6700/Add 14 (Part II), para. 1033, 131.

47. *Sureda*, 314. See also Rapoport, "The Participation of Ministates in International Affairs", P.A.S.I.L. (1968), 157.

48. G.A. Res. 2064(XX) (1965). See also pages 55-57, *supra*.

49. Fisher, "The Participation of Micro-States in International Affairs", P.A.S.I.L. (1968), 164.

Nations is quite reasonable. International law does not possess any machinery for ascertaining economic viability. Thus any attempt to insist on such a requirement could lead to considerable difficulties. In the absence of any rules or proper machinery, to deny a unit the right to self-determination, in the face of persistent and gross violations of basic human rights on the grounds that it cannot demonstrate future economic viability would be without any legal or moral justifications.

Capacity to Engage in Normal International Intercourse

As indicated earlier, it has been suggested that an entity that is not economically viable may not be able to fulfil its obligations arising from international relations. It may thus be prudent to preclude such an entity from exercising a separatist self-determination. The validity of this argument may be examined in two main areas of contemporary international relations viz.: (1) The capacity to fulfil Charter obligations; (2) The capacity to enter into international relations.

1. Capacity to fulfil Charter obligations: Admittedly, an entity which is not economically viable may encounter problems in fulfilling its obligations under the U.N. Charter. In 1965 the Prime Minister of Gambia openly admitted to such difficulties.<sup>50</sup> This situation could

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50. A/P.V.1332 (Sept. 21, 1965). One cynic notes in relation to the Maldives: "if the United Nations did not have the improvident rule of paying the cost of transportation of five delegates from each Member (state) to each General Assembly there is room for doubt whether the Maldives could mount the resources to ferry a delegate to New York to cast the equal vote it there enjoys with the United States and the Soviet Union" (Schwebel, "Mini States and a More Effective United Nations", A.J.I.L. (1967), 108-116, 109). For further discussions on the problems of small states generally see Fisher, *op.cit.*, note 49, Rapoport, *op.cit.*, note 47; Harris, "Micro-States in the United Nations: A Broader Purpose", Col.Journ.Int'l.L., Vol. 9 (1970), 23-53. de Smith, *op.cit.* note 36; Blair, *op.cit.*, note 38.

raise doubts about the eligibility for U.N. membership.<sup>51</sup> In 1967, the U.N. Secretary General observed that full membership for economically nonviable entities could be onerous and could also lead to the weakening of the U.N.<sup>52</sup> Similarly, when the Maldives Island applied for U.N. membership the U.S. delegate argued that:

The Charter provides that applicants must not only be willing but also able to carry out their obligations ...Today many small emerging entities however willing do not have the human or economic resources to meet this second criteria.<sup>53</sup>

Despite this observation, the Maldives Island was admitted to the United Nations with a population of only 101,000. The organization also admitted the tiny state of Luxembourg.

Notwithstanding the observations of the Secretary General, there is yet no precedent in the U.N. for a refusal to admit a state on account of its size or incapacity to fulfil its Charter obligations.<sup>54</sup> Given the universalist outlook of the U.N. and its flexible approach to the issue of self-determination in relation to statehood, it is doubtful whether there would ever be any such precedent by which one can assess the capacity of claimant groups in the post-colonial era.<sup>55</sup>

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51. Article 4(1) of the U.N. Charter provides that Membership is "open to all other peace-loving states which accept the obligations contained in the Charter, and in the judgement of the Organization, are able and willing to carry out these obligations." In the *Admissions Case*, these conditions were held to be exhaustive (See I.C.J. Reports (1947-48). See also Gross "Election of States to U.N. Membership", P.A.S.I.L. (1954), 37-59.

52. The Secretary General's Annual Report (1967), para. 164, 22 U.N. G.A.O.R. Supp. A, 54-65.

53. S/P.V. 1243.

54. It is interesting to note however that in the days of the League of Nations, the League Council rejected application for membership from Liechtenstein. In the admission of Mandates to statehood the League of Nations also made economic viability among other factors a necessary precondition. See generally Ritcher, *The Criteria of Capacity for Independence* (1934), particularly Chapter 1.

55. Reisman, *op.cit.*, note 43. In his (1967) annual report, the U.N. Secretary General also advocated associate membership for smaller states. See note 52 *supra*. See also Schwebel, *op.cit.*, note 50

Even if one accepts that incapacity to fulfil Charter obligations may preclude membership in the U.N., the case for economic viability still remains unconvincing. There is a significant distinction between eligibility for self-determination and eligibility for U.N. membership. An entity may have the right to self-determination without necessarily being eligible for U.N. membership. U Thant emphasized this point in his 1967 annual report when he observed that the smallest territory has the right to self-determination through attaining independence and that such states could be associate members of the United Nations.<sup>56</sup>

In actual practice one sees that Western Samoa became independent but did not join the U.N. immediately. Nauru is an independent state but not a member of the U.N. and so is Vanuatu.

2. The capacity to enter into International Relations: The capacity to enter into international relations is an essential attribute of statehood.<sup>57</sup> However this relates to the government and independence of an entity and not its economic affluence.<sup>58</sup> One can therefore not logically require a claimant group to demonstrate a potential for such an element before its separation.

The Relationship between the Size of a Separating Territory and its Economic Viability

There is a general tendency to assume that there is a correlation between the size of a territory and its economic viability. It is

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55. (contd) *supra*, for a discussion on the feasibility of associate membership. Mendelson also discusses other proposals on alternative membership of diminutive states in the United Nations, *op.cit.*, note 29 *supra*, 623-630.

56. Secretary General's Annual Report, *op.cit.*, note 52 *supra*, at 20.

57. Article 1(d), 1933. Montevideo Convention on Rights and Duties of States, L.N.T.S., 165, 19.

58. Brownlie, *Principles*, 76.



thus argued that in admitting claims, it is necessary to consider the size of the claimant territory and to reject it if the territory is too small to be viable. There is no simple answer to the issue as to whether the largeness of a territory *per se* can make it economically affluent. A great deal depends on the available natural resources, education and more generally the level of political culture.<sup>59</sup> In general terms the notion that large territories tend to have a development advantage over smaller ones has been proved to be empirically incorrect.<sup>60</sup> China, India, Indonesia and Egypt are among the world's poorest nations in terms of their gross national product (GNP) despite the vastness of their territories. On the other hand, since WWII small states such as Singapore, Taiwan, Hong Kong, Gabon, Nauru and Panama have achieved high growth rates with corresponding increases in their GNPs.<sup>61</sup> The success of such small states confirms the view that "the once prevalent concept that territorial vastness is a necessity for national security and for self-sufficiency in national economy has long become obsolete".<sup>62</sup>

If economic viability depends *inter alia* on natural and human resources it would seem logical that given the idea of a territory's resources, its potential for economic viability or otherwise can be determined or predicted. It has thus been suggested that the capacity for self-government and the viability of a territory can be empirically verified by weighing a given number of indices or factors derived from an equal number of objective observable phenomena.<sup>63</sup> However, the

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59. Lung Chu-Chen, *op.cit.*, note 15, 213.

60. Nathaniel Leff observes that "a rank correlation computed between GNP and rates of growth for 47 developing countries during the years 1960-65 indicated that there is no correlation between size of a territory and its economic growth" (Leff, *op.cit.*, note 43, 130-131).

61. *Id.*, 130.

62. Hertz, "The Rise and Demise of the Territorial State", *World Politics*, Vol. 9 (1957), 473.

63. Dodd, "The Scientific Measurement of Fitness and Self-Government",  
(contd)

issue is not as simple as that. Economic viability as a phenomenon, does not sometimes lend itself to predictions. In 1953 the United Nations decided to grant independence to Libya in an attempt to dispose of the Italian colonies. Clyde Eagleton questioned the wisdom of the Libyan exercise of self-determination. He observed:

No one has asked whether these areas had sufficient cohesion or capacity to stand alone. Self-determination was arranged from outside. Now it appears that Libya, is, at least from the economic viewpoint, unable to sustain herself. Is it the responsibility of the U.N. which created Libya to give it financial support or support against aggression...? Who has gained anything by this act of self-determination? 64

More specifically, he noted, "it cannot be assumed as it has been in these debates that independence is always a good thing for any particular group. Has it been good for Libya?"<sup>65</sup> Eagleton's remarks were obviously based on Libya's apparent predicament in 1953. Today Libya is one of the richest countries in the world. It enjoys a high *per capita* income and possesses one of the most well equipped armies of the world.

Where a territory has no observable natural resources, the possibility of future discoveries could change its fortunes. On the other hand, even where a territory has substantial resources, political instability, economic mismanagement and changes in the world market situation could render it economically nonviable at some future date.

One cannot of course deny completely the fact that some small states may, and in fact do, experience economic hardships in a world where aid is scarce. However, the chances of small territories surviving economic difficulties are obviously greater than those of larger

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63.(contd) Scientific Monthly, Vol. 19 (1954), 94.

64. Eagleton, "Self-Determination in the United Nations", A.J.I.L., Col. 47 (1953), 88. See also similar comments in respect of Belize, Herman, "British Honduras, A Question of Viability", World Affairs, Vol. 138 (1975), 60.

65. *Id.*, 91.

entities with little resources. High public expenditure and the demands of a large population could drive a large country into bankruptcy.<sup>66</sup>

Small entities, like big entities, could have economic problems that might well render them nonviable. However, this does not preclude the possibility that a territory with ostensibly little or no resources can, at some future date, develop itself into a respectable member of the world community.

Where an entity with a "doubtful viability potential" demands self-determination, we have one of two alternative solutions. We can grant it self-determination despite its doubtful potential or we can deny it the right. Where the demand is founded on the violation of the minimum content of human rights, it would seem prudent to resolve any doubts in favour of the claimant group and grant it self-determination. The alternative solution in this situation would be to foster the association of the group with the parent community which is guilty of the violations. The latter solution seems less preferable.

## 2. Territorial Viability

Territorial viability relates to the requirement that a territory having exercised its right to self-determination would be able to continue existing as a cohesive body politic as such. It has been argued that this requirement is essentially an environmental prerequisite for ensuring a group's continuing right to self-determination.<sup>67</sup>

The requirement of territorial viability is basically a demand that an entity once established must assume permanence. The logical extension of this requirement is that an entity is not eligible for

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66. Compare for instance, Zaire's international debts to Gambia's. See also the comparative analysis of bigger and smaller states in Africa in Johnson and Rosebery, *op.cit.*, note 7 *supra*.

67. The Logic of Secession, *op.cit.*, note 12, 818.

self-determination if it does not demonstrate a potential for future cohesiveness. In Buchheit's view, where the future cohesive factor is not taken into consideration in assessing capacity, there could be a danger of indefinite divisibility and instability.<sup>68</sup>

The case for territorial viability is hard to sustain. Territorial permanence or viability as such is not a requirement in international law for the creation of a state and neither is it an attribute of statehood. However, it may only be an important piece of evidence as to the possession of the necessary attributes of statehood.<sup>69</sup> It is therefore doubtful whether such a requirement should apply to entities aspiring to be states.

In the Restatement of American Law (Foreign Relations) it is suggested that an entity seeking statehood must as a precondition, show reasonable indications that the requirements of statehood would continue to be satisfied.<sup>70</sup> This precondition is rather inconsistent with the definition of a state in the restatement itself, which makes no mention of continuous existence.<sup>71</sup>

Empirical evidence suggests that, far from being permanent, some bodies politic have been known to exist for only brief periods. In the post-colonial context, the Federation of Mali lasted from only 20 June to 20 August 1960. The British Somaliland lasted for only 5 days as a separate state. It united with Italian Somaliland to form the Republic of Somalia.<sup>72</sup>

On the other hand, it may perhaps be argued that even though

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68. Buchheit, *Secession*, 230.

69. *Crawford*, 72.

70. The American Law Institute Draft Restatement, 2nd Foreign Relations Law of the U.S. (1965), Sect. 100.

71. *Id.*, Sect. 4.

72. Note 69, *supra*.

international law (as *lex lata*) does not require territorial viability as an aspect of statehood, it is nevertheless desirable (i.e. as *de lege feranda*) to make the requirement a necessary aspect of any policy on post-colonial self-determination. Common sense dictates that if a state entity is to be created it must be viable and that permanence in any case, helps to ensure predictability and stability in international relations. Any such argument would have a number of difficulties. How can an entity demonstrate future viability? By what yardstick is viability to be measured? If we assume that territorial viability can be measured what ought to be the minimum potential life-time of a cohesive entity?

The many problems associated with territorial viability tend to make the requirement unrealistic. An ostensibly cohesive community at one period may turn out to be divided by civil strife and disunity in later periods, due to a change in social or political circumstances. The degree of certainty (if any) with which one can predict territorial viability is therefore very minimal. For instance, on the eve of independence in India, considerations for the viability of the subcontinent as a cohesive entity prompted the partition and the subsequent creation of India and Pakistan as separate states. In Pakistan, the peoples were united by common religious bonds and above all, the fear of Hindu domination.<sup>73</sup> A change in the political circumstances and then complaints of economic exploitation broke the cohesion in Pakistan and resulted in the 1971 disturbances and the eventual secession of Bangladesh.

The requirement of territorial viability is inherently contradictory even if accepted on the grounds of public policy. In real terms, a secessionist self-determination diminishes the land mass and

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73. Saxena, *Self-Determination from Biafra to Bangladesh* (1980), 50.

the population of the parent state. With each case of secession, then, the viability of the parent state on the basis of its previous geopolitical boundaries and population is destroyed and its future viability sometimes thrown in doubt. One cannot therefore permit the secession of a claimant group in the post-colonial context upon proof of territorial viability, and still continue to recognize the capacity of the parent state to exist as a cohesive polity. To require proof of viability in order to admit a claim to self-determination would lead to the logical but absurd situation in which the continued eligibility of a parent state to exercise the right would be questionable in every case of secession.

#### ON THE IMPLICATIONS OF A POST-COLONIAL SELF-DETERMINATION EXERCISE

As indicated earlier, the general view of most commentators on post-colonial self-determination is that eligibility for the right ought to be assessed among others, in terms of the implications of a given exercise on:

1. The parent community
2. The World Order.

#### Implications on the Parent Community

Suzuki recommends that a separate entity should not be created in a way such as to destroy the parent community. In his view, it is important to consider the implications on the remaining territory in terms of loss of wealth and in terms of its total economic system and resources.<sup>74</sup> Similarly, Buchheit also suggests that since secession diminishes the population and landmass of the parent state, one ought to examine carefully the economic and political implications on the parent state before admitting a claim.<sup>75</sup>

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74. Suzuki, *op.cit.*, note 13 *supra*, 861.

75. Buchheit, *Secession*, 232; Chen, *op.cit.*, note 1 *supra*, 211.

The need to consider the implications on the parent community is rationalized on the thesis that any action (such as secession) that weakens the surviving state can encourage future foreign intrusion into its affairs and destroy its viability. The self-determination of the parent state could thus be undermined by separatist action. A claimant group is therefore precluded from exercising the right if its action is likely to undermine the values it seeks.<sup>76</sup>

This rationale should be examined critically in the light of the prescriptions recommended in this work.

Self-Determination for Territorial Disputes: In applying self-determination to territorial disputes, the implication of the exercise on parent state would be irrelevant. In the case of boundary disputes, the application of self-determination would be the result of a mutual agreement between the contesting states. Where there is such an agreement, the issue of the implications of the exercise does not arise for consideration. However, where the resolution of the dispute affects a given economic or strategic resource formerly under the sole control of one of the contesting states, a joint exploitation of the resource could be a very prudent approach to the problem.

Where self-determination is applied to a former colony which did not exercise the right and is consequently the subject of a dispute, the implications of an exercise on the state that claimed the territory is of very little significance. For instance, in the case of Western Sahara or Namibia, it is very doubtful whether one can argue that self-determination must be determined by the economic and political consequences for the claimant states.

In the case of Namibia, a major impediment to negotiations on the territory's future is the South African disapproval of SWAPO's \*

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76. "The Logic of Secession", *op.cit.*, 12, 819.

\* South West Africa People's Organization.

participation in the elections of the territory. Given South Africa's potentially explosive internal political situation, it rejects a communist oriented SWAPO government across its border in Namibia for good security reasons. Similarly, in Timor, the major concern of Indonesia appears to be the prevention of a communist government under the leadership of the FRETELIN.

The position of South Africa and Indonesia may be politically convenient for both states. But the exercise of self-determination by a territory ought not be determined by the security needs of another territory. The very essence of self-determination as an expression of free-will independent of outside interference would be contradicted if one permitted the exercise of self-determination to be determined by the needs of the contesting states in these cases.

For similar reasons, the eligibility of a displaced people for self-determination ought not be assessed in terms of the implications on the occupying state. In the case of Palestine, Israel has been known to justify its continued occupation of the West Bank and the Gaza on the basis of its national security needs and its right to exist as a nation which is basically a right to self-determination. The Israeli position in effect tends to preclude any Palestinian self-determination that undermines the principle with regard to Israel.<sup>77</sup>

We indicated earlier that in Resolution 242, the Security Council recognized the right of all parties in the Middle East to exist in the region. In a way, the resolution amounts to an implicit recognition of the need for a balance between the rights of the Palestinians and Israelis. However, the General Assembly has also on several occasions affirmed the right of Palestinians to self-determination and condemned

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77. See pages 275-276, *supra*.



the Israeli occupation.<sup>78</sup> The General Assembly's position would seem to imply that Palestinian rights to self-determination cannot be sacrificed for Israeli security needs. If anything, the two would have to co-exist. As Ben Gurion once observed:

The Arab in Palestine has the right to self-determination. This right is not limited and cannot be qualified by our own interests...It is possible that the realization of (their) aspirations will create serious difficulties for Israel, but this is not a reason to deny their right.<sup>79</sup>

Self-Determination for the Protection of the Minimum Content of

Human Rights: Where self-determination is applied as a sanctioning right within our scheme, the implications of the exercise on the parent state, ought to be irrelevant. If a state is aware of the possible application of self-determination and still proceeds on *extreme* or *gross* violations of the basic rights of a claimant group, it would be illogical to reject a claim for remedial self-determination on the grounds that it would affect the parent state adversely. By extreme and gross violations we mean a consistent or persistent pattern of infringement which affects a substantial portion of the members of the claimant group (as for example the case was in Bangladesh).

It is conceded that in assessing claims of post-colonial self-determination, the interests of the claimants must necessarily be balanced with the interests of the parent states. However, the point in issue here is that where human rights' violations in the case of a given claim are of such a magnitude as to support the hypothesis that they are persistent and affect a substantial part of the claimant population, then the self-determination interests of the claimant group must take precedence over the interests of the parent state.

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78. For a chronological list of U.N. resolutions condemning the Israeli occupation see Cattani, *op.cit.*, note 10, *supra*, preface.

79. Ben Gurion (1931) quoted in Rouleau, "The Palestinian Quest", *Foreign Affairs*, Vol. 53 (1975), 274, 266.

If, by its own conduct, a state creates the conditions for separatism, it must be expected to live with the consequences. To deny the affected group the right of self-determination on the grounds that it could have adverse implications on such a state would undermine the very basis of self-determination as a punitive and preventive right as postulated in our scheme.

### Implications on World Order

There is a pervasive view that the exercise of self-determination must be seen to be in harmony with the needs of world public order. In the view of Suzuki, in the grant of self-determination, one ought to consider the issue as to "whether the creation of a separate entity will contribute to the restoration and maintenance of minimum public order in the region. A claim for separatist self-determination is precluded if the disintegration of the original territory will contribute to violence".<sup>80</sup>

Similarly Buchheit also recommends that to preserve peace and security one must consider the effect of a self-determination exercise on the balance of power in the given area. His view suggests that where the exercise could lead to a superpower showdown, self-determination may not be permissible.<sup>81</sup>

When one recommends that self-determination must be in harmony with world order, it implies that the principle's exercise must be determined by the needs of the existing world order; but then what is world order? There seems to be no standard definition. The McDougal and Laswell school speak of "minimum world order in the sense of preventing unauthorized coercion and optimum (world) order in the sense of the promotion of the greatest production and wider distribution of

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80. Note 74.

81. Buchheit, *Secession*, 232.

all values" in the community.<sup>82</sup>

In 1965, a symposium organized by the Institute for World Order in Italy was devoted to a definition of the conditions for World Order. The prevailing views at the symposium were summed up as follows:

Two meanings were purely descriptive: order as any arrangement of reality, order as the relationship between parts. Two were analytical - partly descriptive, partly normative: order as the minimum condition for good life.<sup>83</sup>

World order however defined, is the antithesis of world anarchy. World order is thus a preferable community objective to the extent that it embodies peace and security. It is in a sense a global environmental prerequisite for the preservation of human persons and human rights. Impliedly, world order, however construed, cannot be said to be an end in itself. It is a necessary condition for the maintenance of human rights and human dignity. Where the existing world order fails to promote the broader community objectives of the preservation of the human person and his basic rights, it loses its *raison d'etre*. It thus becomes necessary to adopt a new order.

It has been proposed in this work that post-colonial self-determination could be used among others to protect and promote the minimum content of human rights. Where the existing world order conflicts with the principle in this role, it would be prudent to make a choice that promotes the human rights objectives most. Thus if self-determination best serves the interests of human rights in the given circumstances, the existing norms of world order ought to be restructured to conform to the dictates of the principle and not *vice versa*.

Shukri observes that there is an "association between a better

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82. McDougal and Feliciano, *Law and Minimum World Order* (1960), preface.

83. Hoffman, Report of the Conference on Conditions of World Order, June 12-19, 1965, Bellagio, Italy (1966), 455-78.

world order and the principle of self-determination".<sup>84</sup> This view is only a reflection of the dynamics of international relations since the end of WWII. Before this period, colonialism constituted an important aspect of world order at least from the point of view of the metropolitan states. The emergence of the right of self-determination led to changes in the world order, the creation of new states and the increasing emphasis on human rights in international relations. Since WWII, self-determination has shaped the world order considerably and not *vice versa*. In support of this argument it has been observed that,

Self-determination is not defined by any predetermined concept of world order. Self-determination itself is becoming the basis for the international order. Embedded in its evolution is the desire of human beings to have an equal opportunity for control of their international environment. At the root of this is the broader issue of human rights. World order will come to mean the granting of equal opportunities with no group or individual more equal than the other.<sup>85</sup>

Some commentators have suggested that international peace and security on the one hand and territorial integrity on the other hand are essential bases of the existing world order. In their view, since separatist self-determination undermines territorial integrity and could lead to a break of the peace, it is potentially an antithesis to such values. On the face of it, this would seem correct. However, a closer examination reveals that there is no contradiction between these values on the one hand and self-determination when used in our scheme on the other hand.

The objective of territorial integrity and international peace and security is not to perpetuate injustice and foster human degradation but advance human rights. With respect to peace, Wilson once

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84. Shukri, *The Concept of Self-Determination in the United Nations* (1965), 3.

85. Johnson and Singh, *op.cit.*, note 3, 358.

observed that:

No peace can last or ought to last which does not recognize and accept the principle that governments derive all their just power from the consent of the governed.<sup>86</sup>

In the post-colonial context, where peace fails to prevent the violation of minimum human rights it loses its essence. In such a situation, if self-determination is claimed as a sanctioning right it would be an affront to justice to deny the right on the grounds of peace and security.

With respect to territorial integrity, it is submitted that if territorial integrity results only in massive deprivations of human rights in the territory, the state loses the justification for its existence. In this case, one can hardly sustain the argument that remedial self-determination is impermissible because it undermines territorial integrity. This view is consistent with the provisions on self-determination in the Declaration on Friendly Relations. The latter does not see territorial integrity as sacred. The maintenance of territorial integrity is made conditional on the conduct of the state being in conformity with equal rights and self-determination.

#### CONCLUSION

In considering whether or not to support a claim, the existence of a *prima facie* case is not enough. The claim must be viewed in relation to a set of substantive conditions comprising existing international law norms, world order needs, and the interests of the parent state. In more specific terms, the claimant must establish a determinate population confined to a definite territorial base. In the cases of claimants who base their demands on racial discrimination

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86. U.S. Congressional Records, Pt. 2 - at 1742.

(and therefore seek equality within the state system as opposed to secession from it) the territorial requirement would be unnecessary. With respect to a displaced people seeking to recover occupied territory, there must be evidence of previous confinement to the territory which they claim as the basis of self-determination.

The size of a claimant's population and territory (i.e. where territorial element is required) are not essential to a claim. However a vast territorial base and a large population could be valuable elements that can be used to support a group's claim particularly where the group demands secession.

A combination of a sizeable territorial area and population, and rich natural resources could give an indication of the future economic prospects of a secessionist claimant unit, and thus reinforce its claims. However, a claimant need not demonstrate a future economic or territorial viability potential. This is because by their very nature neither economic nor territorial viability can be predicted accurately.

Claims must also be assessed in terms of world order but with specific qualifications. Where available evidence suggests that a claimant group has been subject to persistent patterns of gross violations of basic human rights, the group's self-determination interests must be considered as pre-emptory. Similarly, where such evidence exists, the need to honour the claimant's demands must override the interests of and the implications on the parent state. On the other hand, where there is no evidence of persistent pattern of gross violations the interests of the parent state must prevail. In other words, in order for a claim to merit support, a proper foundation manifested by evidence of human deprivation of great magnitude, must be established. The recommendation for states to support a

post-colonial claim to self-determination in these circumstances can be rationalised on the grounds that the *raison d'etre* of existing world order and the state system is the protection of human rights and human dignity. Consequently, when they fail to protect these values and foster gross violations, they lose the reason for their existence and thus justify the establishment of a new institutional mechanism to protect the values in question.

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## CHAPTER NINE

### RECOMMENDED PROCEDURAL CONDITIONS FOR SUPPORTING CLAIMS

Where a claim is founded on violations of human rights, the group's demands are usually a response to a deteriorating state of affairs for which it finds no other preferable solutions.<sup>1</sup> To support such a claim, it is necessary to verify objectively the group's assessment of the "no other preferable solution" situation. In other words, within our scheme a claim to self-determination ought to be supported only as a last resort, where no other solution promises to protect and promote the basic rights of the claimant group in the given circumstances.<sup>2</sup>

A claimant's assessment of a "no preferable solution" could be verified within a framework of procedural conditions. These may include the exploitation of alternative remedies through:

1. the domestic system by:
  - (a) negotiations with the parent state
  - (b) resorting to the municipal judicial process
2. regional institutions
3. global or United Nations institutions on human rights.

1. Suzuki, "Self-Determination and World Order. Community Responses to Territorial Separatism", Va.J.Int'l.L., Vol. 16 (1975-76), 798.
2. A similar position was adopted by the Committee of Rapporteurs in the *Aaland Island Case*. It was observed that:
 

"the separation of a minority from the state of which it forms a part...can only be considered as an altogether exceptional solution, a last resort when the state lacks either the will or the power to enact and apply just and effective guarantees"

(Report of the C'ttee of Rapporteurs, 16th April 1921, U.N. Counc.Doc B7/21, 68/108 (VII), 28).



1. THE DOMESTIC SYSTEM

Negotiations with the Parent State

There is hardly a case of self-determination dispute which is not accompanied by some form of negotiations between the claimants and the state authorities. It is submitted that the fact that the parties engage in some initial negotiations could be indicative of a general willingness among them to seek alternative solutions. The claim categories in Chapter Four indicate that as a general trend, separatist agitations degenerate into major conflicts only after the parties have failed to reach a negotiated compromise in the domestic process.

In the case of Biafra, one sees that the abortive secession was preceded by a series of negotiations and other reconciliatory efforts.<sup>3</sup> Similarly in Bangladesh, when the initial disturbances broke out following the indefinite suspension of the constituent assembly, attempts were made to seek a peaceful negotiated settlement. In fact, the massacres that culminated in the secession started on the 25th of March 1971, the day on which negotiations on the crisis ended in a deadlock.<sup>4</sup>

Admittedly, the negotiations failed to prevent the secession attempts in Biafra and Bangladesh. Nevertheless, such negotiations played the vital role of bringing all the parties together to look for alternative solutions.

Domestic negotiations can provide an opportunity for finding possible solutions. It is therefore recommended that a claimant group seeking international support should produce evidence to show

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3. For a documentary report on the negotiations see NYUJILP, Vol. 2, (1969), 398-433; 420-422.

4. Pages 217-218, *supra*.

that it has engaged in negotiations with the parent state and that "no preferable solution" could be found in the given circumstances. It is recognized that in some cases it may be impracticable or predictably fruitless to attempt any form of domestic negotiations. In such cases, the claimant could dispense with the requirement. It must, however, establish that such a situation existed.

#### Judicial System of the Parent State

Human rights are basically rights against the state. Violations or breaches of "the minimum content" therefore are usually the result of state actions. Such breaches could take the form of legislative enactment or executive conduct.

Where the state's action constitutes an infringement of the constitution, the claimant group should exploit every available constitutional remedy through the judicial system. In concrete terms, where a state's enactment leads to racial discrimination or cultural genocide and thus contravenes constitutional guarantees, the affected group ought to contest the action of the state in the domestic courts of law.

Since the violations the group may allege could be the direct result of a deliberate state action, it is possible that in some cases the pursuit of domestic constitutional remedies would be predictably fruitless and unnecessary. One must, however, not overlook the fact that in some cases it is possible for a victim group to secure constitutional remedies. In the Australian case of *Koowarata v. Bjelke-Peterson*, The High Court of Australia declared an enactment of a constituent state to be unconstitutional to the extent that it fostered discrimination against Australian Aborigines.<sup>5</sup> There have been similar

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5. Australian Law Rep., Vol. 49 (1982), 417-495.

significant declarations in the U.S. affirming the constitutional rights of minority groups against discrimination.<sup>6</sup>

Where a group considers that given its peculiar position, it was impossible to pursue such constitutional remedies, it ought to adduce evidence to establish this contention.

### Remarks

The need to exploit alternative remedies within the domestic process is consistent with the general international law rule on the exhaustion of local remedies.<sup>7</sup> It must be pointed out that the local remedies rule was held to be inapplicable to the protection of minority rights in the post WWI minority settlements.<sup>8</sup> In modern

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6. Note 96 of Chapter Six, *supra*.

7. On the international law position regarding local remedies see generally: Law, *The Local Remedies Rule in International Law* (1961); Hader, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968). Trindade, "Domestic Jurisdiction and the Exhaustion of Local Remedies: A Comparative Analysis", I.J.I.L., Vol. 16 (1976), 187-218; "The Burden of Proof with Regard to the Exhaustion of Local Remedies in International Law", *Revue des Droits de L'homme*, Vol. 9 (1976), 81. See also Amerasinghe, "The Rule of Exhaustion of Local Remedies and International Protection of Human Rights", *Indian Yearbook of Int'l. Affairs*, Vol. 18 (1974), 3; Mummery, "The Content of the Duty to Exhaust Local Remedies", A.J.I.L., Vol. 58, (1964), 389.

8. In the *Szekler Petitions*, The Rumanian Szekler Frontier Guard Regiment comprising mainly people of Hungarian origin petitioned the League Council against the government of Rumania. They complained of discriminatory treatment in the expropriation of property which was in violation of the terms of the Minorities Treaty with Rumania. When the Rumanian State lodged a preliminary objection on the grounds of the non-exhaustion of domestic remedies, the Committee of Jurists dealing with the case noted that to require a domestic remedies rule in the protection of minorities "would be equivalent to saying that the infraction of a Minority Treaty only takes place when the possibilities of redress under municipal law are exhausted or in other words when the infraction is definitive" (L.N.O.J., 13 (1932), 1421-24). When a similar issue came up in the *Upper Silesia Case*, the Committee of Jurists accepted that the local remedies principle may be regarded as a rule of international law in matters of international responsibility. The Committee then went on to say that:

"It would be mistaking its significance and purpose to extend it as a general rule necessarily applicable in case  
(contd)

times however, the rule is accepted in human rights instruments.<sup>9</sup>

Apart from providing a forum for the parties to look for a domestic settlement, the requirement for the exhaustion of domestic remedies in the scheme can also be rationalized on the same basis as the international rule on local remedies, i.e. "to protect the right of a State to exercise its domestic jurisdiction within its own boundaries".<sup>10</sup>

The requirement to pursue and exhaust domestic remedies does not affect the international character of the basis of a claim. As Judge Lauterpacht noted in the *Norwegian Loans Case*, "the failure to exhaust local remedies may only constitute a bar to the jurisdiction (of an international tribunal), it does not affect the intrinsically international character of a dispute".<sup>11</sup>

There is a relationship between domestic jurisdiction and the local remedies rule; in fact in some cases it is difficult to maintain proper distinction between the two concepts.<sup>12</sup>

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8. (contd) of doubt outside the sphere of international responsibility...In particular it would be inadmissible to regard it as a principle for the regime for the protection of minorities."

The Committee rationalized its position by observing that the "object of the regime for protection of minorities is to provide not occasional reparation for certain damages but the normal and regular operation of a body of rules laying down the status of the minorities" (L.N.O.J., 14 (1933), 813-14).

9. Article 26 of the European Convention provides that the Human Rights Commission may only deal with a matter brought before it "after all domestic remedies have been exhausted according to the generally recognized rules of international law". See also Article 54 of the Regulations of the Inter-American Commission on Human Rights.
10. Waldock, "General Course on Public International Law"; Hague Recueil II (1962), 1-73; "The Plea of Domestic Jurisdiction Before International Legal Tribunals", B.Y.I.L. Vol. 31 (1954), 96.
11. I.C.J. Rep. (1957), 38.
12. The *Losinger Case* (Preliminary Objections), P.C.I.J. Ser. A/B, n.67 (1936), particularly the submissions at 18-181; *The Interhandel Case*, I.C.J. Rep. (1959), Pleadings Oral Arguments and Documents (1957), particularly the submission on behalf of the U.S. by Becker; see also the *Aerial Accident Case*, I.C.J. Rep. (1959), Pleadings (1959).

However, the domestic jurisdiction rule operates as a substantial bar to the exercise of international jurisdiction on material grounds. On the other hand, the plea of non-exhaustion of local remedies operates as a bar to the admissibility of a claim at the international level. The local remedies rule does not necessarily hold that a matter is *prima facie* within the exclusive domestic jurisdiction of the State. It rather implies that the matter may be examined at international level, e.g., if remedies are exhausted and no local redress is provided.<sup>13</sup>

## 2. REGIONAL INSTITUTIONS

A claimant may resort to regional institutions where it is unable to secure any redress through domestic remedies or where it considers it predictably fruitless to exploit such remedies. By "regional institutions" are meant such bodies as the Organization of American States (OAS), the OAU, the Arab League and the Council of Europe, with a continental or hemispheric basis, a set of decision-making institutions, and established procedures for the pacific settlement of disputes.<sup>14</sup> The basis for such institutions could, but not necessarily, be the element of geographical unity which is reinforced by a common ideological or ethnic background.<sup>15</sup>

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13. Trindade, *op.cit.*, note 7, 215.

14. Miller, "Regional Organization and the Regulation of Internal Conflicts", *World Politics*, Vol. 19 (1967), 584-45. Usually the paramount objective of such bodies is to ensure peace within their regions. See Calvocoressi, *World Order and New States* (1962), 59.

15. Miller, "Prospects for Order Through Regional Security", in Falk and Black (eds), *The Future of the International Legal Order* (1969), 556-594, 572. Thomas Franck also defines a regional institution as any grouping of states in some defined geographic context with historic ethnic or socio-political ties which habitually act in concert through permanent institutions to foster unity in a wide range of common concerns ("Who Killed Article 2(4)?" *A.J.I.L.*, Vol. 64, (1970), 809-837, 832). See also the definition

By resorting to a regional institution, the claim necessarily involves such organizations in internal conflicts. This raises the issues as to whether:

1. a claimant could have standing before regional institutions;
2. regional institutions are competent to intervene in internal conflicts;
3. the action of a regional institution in resolving an internal conflict constitutes "enforcement" under the United Nations Charter and therefore requires the prior authorization of the Security Council.

#### The Standing of Claimant Groups before Regional Organizations

Under Article 33 of the United Nations Charter, parties to a dispute likely to endanger the maintenance of international peace and security are required to "first of all", resort to regional "agencies or arrangements" for a settlement. Article 52(1) consequently allows for the creation of regional bodies for dealing with such "disputes as may be appropriate for regional action". The Security Council also has the prerogative to encourage the use of regional institutions

15. (contd) offered by van Kleffers, in "Regionalism and Political Pacts", A.J.I.L., Vol. 43 (1949), 666, 676, 699. See also Frey-Wouters, "A regional organization...is a permanent, both inner and outer directed multi-functional association, located in a particular geographical area, serving a number of states which are mutually interdependent and share certain common interests, needs, characteristics and loyalties" ("Prospects for Regionalism in World Affairs", Falk and Black, *id.*, 463-555, 466).

For our purposes, we exclude defence arrangements from regional institutions. This is because by their very nature they tend to have an external as opposed to internal orientation even though they sometimes deal with internal conflicts (e.g. NATO's involvement in Cyprus and the Soviet intervention in Czechoslovakia in 1968 under the terms of the Warsaw Pact). Furthermore, regional institutions constitute at least a partial embodiment of the national objectives and interests of Member States. This is more so in the case of defence organizations. Consequently the intervention of one in an internal conflict could be viewed as competitive rather than conciliatory. One may cite the response of NATO states to the Soviet intervention in Czechoslovakia as a typical example.

in disputes settlement.

Article 33 of the Charter only mentions "parties to a dispute". It does not appear to restrict itself to United Nations members. However, its provisions must be read with the rest of the Charter which is addressed to the Member states. The provisions of Article 33 thus refer to the state parties to international disputes rather than parties to intra-national disputes. A logical corollary to this would be that a claimant in a self-determination conflict has no standing before regional organizations under Article 33.

In practice, however, the situation is quite different particularly in the case of Africa where intra-national self-determination disputes have become a common place in the post-colonial era. During the Biafran crises the Biafrans petitioned the OAU Summit in Kinshasa to discuss the issue. The OAU Assembly of Heads of States and Governments declined to discuss the merits. They rather adopted a resolution affirming the territorial integrity of Nigeria.<sup>16</sup> It is significant to note that the *locus standi* of Biafra, before the OAU was not at any time disputed.<sup>17</sup> In fact, after the OAU's affirmation of Nigeria's territorial integrity, the organization's Consultative Mission on Nigeria met with the Biafran leaders at Niamey and Addis Ababa in an attempt to find a solution.<sup>18</sup>

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16. A.H.C./Res. 51 (IV).

17. Initially, Nigeria protested against the intervention of the OAU on the grounds of domestic jurisdiction. However, the domestic jurisdiction argument was maintained not *vis-a-vis* the OAU, but in opposition to the other party (Biafra) whose *locus standi* was that the matter was more than internal. In raising the objection, of domestic jurisdiction, the Federal Government was therefore stating its own case as a party to the conflict which was that, no concessions be made to secession. (Tiewul, "Relations between the United Nations and the OAU in the Settlement of Secessionist Disputes", Harvard Journ.Int'l.L., Vol. 16 (1975), 259-302, 297.)

18. Note 3 *supra*; see also Akinyemi, "The OAU and the Concept of Non-Interference in Internal Affairs of Members States", B.Y.I.L., Vol. 46 (1972-73), 393-400, 397-398.

In the case of Sudan, Southern rebels also petitioned the OAU to send observers to investigate allegations of genocide. The organization ignored their appeals. However, an assistant secretary general of the OAU participated in the negotiations between the rebels and the Sudanese government in Addis Ababa in 1972. The negotiations led to the granting of internal autonomy for the Southern Sudan.<sup>19</sup>

The OAU has been petitioned by the Eritreans in their secessionist struggle from Ethiopia. Similarly, the POLISARIO of the Western Sahara has appeared before the organs of the organization in several instances. As indicated earlier, the OAU has not been able to discuss Eritrea due to persistent Ethiopian claims that the issue is domestic.<sup>20</sup> It has however admitted the Western Sahara as its newest member under the name of Sawhari Arab Republic, SADR.<sup>21</sup>

The practice of the OAU is similar to the general position of the Inter-American Commission of Human Rights of the OAS. The Arab League also entertains petitions from the PLO and its subsidiaries even though they are not state parties to the League. In the case of the Council of Europe, its human rights instrument (the European Convention on Human Rights) has specific provisions that admit petitions from individuals and groups to the European Commission on Human Rights and to the European Court on Human

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19. Page 255, *supra*.

20. See page 166, *supra*.

21. Notes 253 and 254 of Chapter Four, *supra*. It must be noted however that the exact status of the SADR today is not clear. Following the failure of the OAU to convene in Tripoli on two consecutive occasions, due partly to the admission of the SADR, arrangements were made to reconvene the summit in Addis Ababa in June 1983. Amid growing fears that the organization might not be able to attract the required quorum if the SADR attended the proposed summit, the SADR volunteered to stay away from it. What is not clear is the legal significance of the SADR's decision not to attend the Conference. On the one hand, it could amount to an admission of the nullity of its membership. But on the other, since the organization has not declared the SADR's membership to be null and void, and summit attendance is not a necessary precondition for continued membership, the SADR could still be a member of the OAU.



Rights.<sup>22</sup> It must however be emphasized that it is only the OAU which has had to deal with petitions relating to post-colonial self-determination. The European Court dealt with issues relating to Northern Ireland in the *Lawless Case*. However the case only concerned the treatment of Irish prisoners and not the Northern Irish claims (Int. Law Reports, Vol. 31, 276).

#### Competence of Regional Institutions

Post-colonial self-determination conflicts are basically intra-national.<sup>23</sup> Each is therefore bound up with the issues of sovereignty and internal jurisdiction of the parent state. To recommend that claimant groups should refer petitions to regional institutions presupposes that such bodies are legally competent to deal with the issues. It is therefore necessary to examine the issue of competence of regional organizations in the resolution of self-determination conflicts.

The utility of institutionalized structures in the settlement of disputes is a function of the extent to which a given organization is not encumbered by its own constitutional limits or ideological orientations. By its very nature, an internal conflict brings such constraints into play *vis-a-vis* regional intervention. Regional bodies, e.g. the Arab League, the OAS and the OAU are basically inter-governmental organizations with no supra-national authority. Their sphere of activity is "limited to the direct interaction between the power

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22. See generally Fawcett, *The Application of the European Convention on Human Rights* (1969); Robertson, *Human Rights in Europe* (1970); Danelius, "Conditions for Admissibility in the Jurisprudence of the European Commission of Human Rights", *Revue des Droits de L'homme*, Vol. 2 (1969), 284; Sohn and Buergenthal, *International Protection of Human Rights* (1973), Chapter 7; Castberg, *The European Court of Human Rights* (1974), Chapter 2. For specific instances of group action before the European Court see the case relating to *Certain Aspects of the Law on the use of Languages in Education in Belgium*, European Court of Human Rights (1968), Human Rights Publications Series A (1968), 4.

23. Cases that involve territorial recovery may be exceptions, e.g. the Somali-Kenya-Ethiopia conflict and the Palestinian Question.

centres of their member units".<sup>24</sup> The organizations therefore tend to be more concerned with inter-state rather than intra-state disputes. This position is reflected principally in the constitutions of such regional bodies.

Under Article III(2) of the OAU Charter, members affirm and declare their adherence to the principle of non-interference in the internal affairs of States. Article 15 of the OAS Charter also provides that no state or group of states has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other state. The OAS prohibition is more comprehensive and covers military, political, economic and cultural non-interference.<sup>25</sup> The Arab League has similar prohibitions. Article 8 of the League agreement provides that each member state shall respect the system of government established in the other states and regard it as the exclusive concern of those states, and abstain from any action calculated to change the established system of government.<sup>26</sup>

The constitutional limitations on the foregoing regional institutions suggest that geneally speaking they are precluded from intervening in internal conflicts. The empirical practice of the regional organizations is however quite different.

### The OAU

In a commentary on Article III(2) of the OAU Charter (the provision on non-intervention), it has been suggested that "whatever the

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24. Frey-Wouters, "The Relevance of Regional Arrangements to Internal Conflicts in the Developing World" in Moore (ed.), *Law and Civil War in the Modern World* (1974), 458, 460.

25. The Charter of the OAS is reproduced in Lawson, *International Organizations* (1962), 325.

26. For a text of the Pact of the Arab League see MacDonald, *The League of Arab States* (1965), 322.

juridical consequences,...an essential feature of (it) is that it is addressed only to the member states"<sup>27</sup> in contradistinction to the OAU as a collective body. The logical extension of this argument is that, subject to United Nations Charter obligations and existing principles of international law, the OAU is not precluded from intervening in internal conflict situations should such an action be necessary to restore peace and security in the region.<sup>28</sup> In contemporary times, there is a general view among African writers that the prohibition under Article III(2) is not absolute.<sup>29</sup> The actual practice of the organization supports their position.

During the second phase of the Congo crisis, African states were initially divided between supporting the Tshombe backed central government on the one hand and the rebels on the other hand. In 1964 however, the various factions brought the issue to the OAU Council of Ministers. The Council was unanimous in the view that the Congo situation constituted a legitimate concern for the OAU.<sup>30</sup> The Conciliation Committee of the organization consequently offered to sponsor negotiations between the parties to the conflict in the Congo.<sup>31</sup> The then president of the Congo, Kasavubu, protested strongly against the

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27. Tiewul, *op.cit.*, note 17 *supra*, 294.

28. *Ibid.*, see also note 108 of Chapter Five

29. Kamanu, "Secession and the Right to Self-Determination, an OAU Dilemma", J.M.A.S., Vol. 12 (1974) 355; Akinyemi, *op.cit.*, note 18, 396-397. For a different opinion see Elias, *Africa and the Development of International Law* (1972), 127, the provision on non-intervention in the OAU Charter is an expression of a desire "to be left alone, to be allowed to choose one's particular political, economic and social system and to order one's community in one's own way". For a more detailed discussion of the OAU Charter and the possible interpretations of Article III (2) see generally Cervenka, *The Organization of African Unit and its Charter* (1969). Okongwu, "The OAU and the Principle of Domestic Jurisdiction in Intra-African Affairs ", I.J.I.L., Vol. 13 (1973), 589.

30. OAU Doc. ECM, Res. 5 (111) (Sept. 10, 1964).

31. OAU Doc., Rep. Ad Hoc C'ttee Cm/UN Doc. 3 Rep. AOM, S.G.

OAU's decision and described it to the Security Council as a "manifest interference in the Congo's internal affairs".<sup>32</sup> The Security Council later confirmed the legitimacy of the OAU's intervention. The Council declared that the OAU,

should be able, within the context of Article 52 of the Charter...to help find a peaceful solution to all the problems and disputes affecting peace and security in the continent of Africa.<sup>33</sup>

Apart from its involvement in the Congo, Biafra and the Southern Sudan cases, the organization also played a significant role in the Chad conflict,<sup>34</sup> and the Tanganyikan mutiny.<sup>35</sup> The practice of the organization supports the contention that "since its establishment, a principle of legitimacy has emerged justifying certain limited non-coercive regional intervention in internal conflicts".<sup>36</sup>

### The OAS

The 1954 Caracas Resolution of the OAS provides that the organization may intervene in the event of the domination or control of the institutions of a member state by communists.<sup>37</sup> Under the Rio Pact,

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32. See 19 UNSCOR, Supp. (Oct-Dec. 1964), 198-200.

33. S.C. Res. 199 (XX).

34. On the Chad conflict and the efforts of the OAU see African Research Bulletin (1979), Sept. 1st-30th, 5411C; Feb 1-25th, 5165B; (1980), April 1-30th, 5644A, May 1-30th, 5662C.

35. In the case of Tanganyika, the OAU intervened at the invitation of President Nyerere. He requested the organization to consider "African solutions" to the mutiny in his country's army. The President had originally called in British troops to maintain order. At an emergency session of the OAU Council of Ministers, it was decided to replace the British troops with Ethiopian and Nigerian forces.

36. Frey-Wouters, *op.cit.*, note 24, 464.

37. 10th Inter-American Conference, March 1-28 (Washington, D.C.)(1954) 94-95. The resolution was adopted as a result of the emergence of a socialist regime in Guatemala. See generally Dreier, *The Organization of American States* (1962), particularly at 43; Neale Ronning, "Intervention, International Law and the Inter-American System", *Journ. of American Studies*, III (1963), 249-71; Dihigo, "Legality of Intervention Under the Charter of the Organization of American States", *P.A.S.I.L.* (1957), 91-100; Travis, Jr., "Collective Intervention by the Organization of American States", *P.A.S.I.L.* (1957), 100-110.

"aggression" is defined as any action against the inviolability or the integrity of the territory or the security or political independence of any American state...or any other situation or fact which may endanger the peace of the Americas".<sup>38</sup> Given the rather broad provisions of the Rio Pact and the Caracas resolution, the OAS appears to have an unrestricted right of intervention in the internal affairs of its members.<sup>39</sup>

In empirical terms, the organization has been known to intervene in Cuba,<sup>40</sup> Guatemala<sup>41</sup> and the Dominican Republic<sup>42</sup> and more recently

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38. Articles 6, 17 and 20. See A.J.I.L., Vol. 42 Supp. (1949), 53.

39. Casteneda observes that "a dangerous trend has come to the fore as regards the principle of non-intervention in America. It is the idea that the principle of non-intervention is to be opposed to the action of other states but not to the collective action which a regional organization may adopt (Casteneda, "Pan Americanism and Regionalism. A Mexican View", Int'l.Org., Vol. 10 (1965), 382). See generally also Thomas and Thomas, *The Organization of American States* (1963), particularly at Chapter 14; *Non-intervention: The Law and Its Import to the OAS* (1956); Cabranes, "Human Rights and Non-Intervention in the Inter-American System", Michigan Law Rev., Vol. 65 (1967), 1147-1182; Le Blanc, *The OAS and the Promotion and Protection of Human Rights* (1977), 11-12; Miller, "Non-Intervention and Collective Responsibility in the Americas", U.S. Dept. St.Bull., Vol. 22 (1950), 768. For a discussion of earlier Inter-American attitudes to intervention, see Fenwick, "Intervention - Individual and Collective", A.J.I.L., Vol. 39 (1945), 645. For an analysis of the influence of the U.S. in the law of intervention *vis-a-vis* the organization see Falk, *Legal Order in a Violent World* (1968), 154-183.

40. See generally, Meeker, "Defensive Quarantine and the Law", A.J.I.L. Vol. 57 (1963), 511-524; Falk, *id.*, 185-223; Berl, "The Cuban Crisis", Foreign Affairs, Vol. 39 (1960), 40; Leo Huberman, *Cuba: Anatomy of a Revolution* (1960); Kennedy, "The Lesson of Cuba", U.S. Dept.St.Bull., Vol. 55 (1961), 659. The OAS involvement in Cuban affairs arose in three separate instances between 1960 and 1962. See Macdonald, "The Relationship Between Superior and Subordinate Political Bodies at the International Level". Canadian Yearbook of Intl'l.L., Vol. 2 (1964), 21-54, 31-50.

41. Fenwick, "Jurisdictional Questions Involved in the Guatemala Revolution", A.J.I.L., Vol. 48 (1954), 597-602; *op.cit.*, note 432 *infra*, 638-89. See also note 37 *supra*, Thomas and Thomas, *op.cit.* (1956), note 39, 297-299; Macdonald, *id.*, 24-31.

42. In the case of the Dominican Republic, the U.S. intervened unilaterally from the beginning on the grounds of the need to protect its citizens in the country. It later sought the support of the OAS for a collective intervention through the formation of an

in Grenada. Apart from these cases, the OAS, through the Inter-American Commission on Human Rights (IACHR) had dealt with petitions involving Haiti, Nicaragua, Argentina and Brazil.<sup>43</sup>

So far, the OAS has not dealt with the types of separatist claims prevalent in Africa. However given its general anti-communist orientation one may reasonably predict that in the event of a claim, the response of the organization would be essentially determined by the ideological inclinations of the claimants.<sup>44</sup>

### The Arab League

In the philosophy of the Arab League regional involvement in internal conflict is legitimate when peace has to be restored and order

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42. (contd) Inter-American force. Initially only Brazil and Paraguay appeared to support the American intervention and the call for a subsequent OAS involvement. The rest of the states in the organization remained reluctant because of what they considered to be a U.S. violation of the non-intervention provisions (Articles 15 and 17) of the OAS Charter. See Wolfgang Friedman, "United States Policy and the Crises of International Law", A.J.I.L., Vol. 59 (1965), 857-871, 865-871; Bohan, "The Dominican Case: Unilateral Intervention", *id.*, Vol. 60 (1966), 809-812; Fenwick, "Has the Spectre of Intervention been Laid in Latin America?", A.J.I.L. Vol. 50 (1956), 636-639; "The Dominican Republic Intervention and Collective Self-Defense", A.J.I.L., Vol. 60, 64-67; Bogen, "The Law of Humanitarian Intervention ; U.S. Policy in Cuba (1898), and in the Dominican Republic (1965)", Harvard Int'l.L.Journ, Vol. 67, 296-315; Slater, "The U.S. the OAS and the Dominican Republic", Int.Conc., Vol. 28 (1964), 287; Macdonald, *id.*, 36-41.
43. Sohn and Buergenthal, *International Protection of Human Rights* (1973), 1293-1355. The IACHR has also dealt with petitions involving Cuba and the U.S. See generally Le Blanc, *op.cit.*, note 39, 107-167.
44. It is interesting to note however that in the self-determination claims involving Belize (see page 86, *supra*) Latin American states supported Guatemala while the English-speaking Caribbean States advocated Belize's right to self-determination. See Franck and Hoffman, "The Right of Self-Determination in Very Small Places", NYUJILP, Vol. 8, 331-386, 364-365. In the dispute over the Falklands, the OAS, with the exception of the U.S., also demonstrated its support for the Argentina. The support was however restrained in the case of Chile.

maintained.<sup>45</sup> The League intervened in the Yemeni conflict and attempted a settlement at its 1967 Summit in Khartoum. It also made efforts to mediate in the Jordanian crisis involving the PLO and the Jordanian government, and intervened in the Lebanese civil war. In all the cases cited, the League failed to secure any lasting settlement. However, its competence to intervene in the cases as such was not disputed.

The League has not yet dealt with separatist issues of any sort, but its practice would seem to suggest that it is a competent regional institution to which claimant groups could resort when they fail to secure domestic remedies.<sup>46</sup>

#### Remarks

The constitutional prohibitions regarding "non-intervention" in the regional institutions are not absolute. Alternatively, it may well be that the forms of intervention prohibited do not include non-coercive, non-subversive and persuasive actions aimed at enhancing the goals of the organizations. This approach would be consistent with the interpretation of the United Nations' position in respect of Article 2(7) of the Charter. Lauterpacht observed that "intervention" as referred to in Article 2(7) must be interpreted with a legal connotation and that it is a technical word meaning "a dictatorial, mandatory interference intended to exercise direct pressure upon the State concerned".<sup>47</sup> In his opinion, this meaning excluded "action by way of

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45. Frey-Wouters, *op.cit.*, note 24 *supra*, 465-6.

46. On the Arab League generally, see McDonald, *op.cit.*, note 26; Boutros-Ghali, "The Arab League: 1945-1955", *Int.Conc.*, No. 498 (1954); Frey-Wouters, "Prospects for Regionalism in World Affairs", in Falk and Black (eds), *op.cit.*, note 15, 498-501. 520-21, 541-42; Thomson, *The Modernization of the Arab World* (1966).

47. *International Law I* (8th ed., 1955), 415-16.

discussion, study, enquiry and recommendation".<sup>48</sup> Similarly, Goodrich and Hambro maintain that mere discussions of an issue may not amount to intervention. They, however, emphasize that "the creation of a commission of enquiry, the making of a recommendation of a procedural or substantive nature or the taking of a binding decision constitutes intervention"<sup>49</sup> under Article 2(7). In the view of Goronwy Jones neither of these interpretations is correct. He argues that "it was the evident intention of those who drafted Article 2(7) of the Charter that the United Nations should observe a strict policy of non-interference in matters traditionally regarded as within the domestic jurisdiction of states".<sup>50</sup> In his thesis, the non-intervention provision has a broader interpretation covering non-interference in matters

such as a state's form of government, the treatment of its own subjects, which covers the entire field of human rights; in the absence of international treaties, its economic policies and questions of immigration and nationality; the size of its national armaments and armed forces: internal conflicts within its territory and the administration of non-self-governing territories not placed under the trusteeship system of the United Nations. The only exception to this general principle which the drafters intended was the competence of the Security Council to authorize enforcement measures to maintain or restore international peace or security.<sup>51</sup>

The *travaux préparatoires* relating to Article 2(7) at San Francisco support Jones' broader interpretation of non-intervention.<sup>52</sup> However,

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48. *Ibid.*, see also same author, *International Law and Human Rights* (1968), 167-8, 214; Hague Recueil, Vol. 70 (1947), 31. Rajan supports Lauterpacht's interpretation. He describes Lauterpacht's approach as "positive and dynamic" (*United Nations and Domestic Jurisdiction* (1961), 74-5).
49. Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents* (2nd ed., Rev. ed.) (1946), 120. Rajan sees this approach as negative and static, *ibid.*
50. Jones, *The United Nations and the Domestic Jurisdiction of States* (1979), 31; see also Preuss, "Article 2(7) of the United Nations Charter", Hague Recueil, Vol. 74 (1949), particularly at 608-9.
51. Jones, *ibid.*
52. See for instance some of the Verbatim Minutes of the Committee discussion on the issue, UNCIO Docs. C'ttee I/1 (June 13, 1945) No. 1-26.



as he himself admits,<sup>53</sup> whatever the drafter's intentions may have been, the current practice of the United Nations does not support a broader interpretation of non-intervention. In fact since the 1947 issue of *The Treatment of People of Indian Origin in the Union of South Africa*,<sup>54</sup> the General Assembly has considered itself competent to deal with human rights issues in Member states notwithstanding occasional protests that such actions contravene Article 2(7).<sup>55</sup>

The legality of a restrictive interpretation of non-intervention, *vis-a-vis* The practice of the United Nations, was affirmed in the *Certain Expenses Case*<sup>56</sup> when the court noted that where "the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of (its) stated purposes the presumption is that such action is not *ultra vires*".<sup>57</sup>

On the basis of their current practices, one could apply this reasoning to regional institutions. Notwithstanding any constitutional

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53. Jones, *op.cit.*, note 50, 44.

54. Yearbook of the United Nations (1946-47), 144-148; see also a comprehensive treatment in Sohn and Buerghenthal, *op.cit.*, note 43, 556-587.

55. As Higgins notes, "this is not to say that an organization can possibly add anything to its powers by exceeding its competency no matter how often such actions may be repeated. However, the practice of the Organization provides important evidence of the development of the law at a given time" (*The Development of International Law* (1963), 72). For a treatment of the twin concepts of intervention and non-intervention in international law see generally: Falk, *op.cit.*, note 39, 156-168; Wright, "Intervention 1956", A.J.I.L., Vol. 51 (1957), 53; Winfield, "The History of Intervention in International Law", B.Y.I.L. (1922-23); Bowett, "Interrelated Theories of Intervention and Self-Defence", in Falk and Black, *op.cit.*, note 15, Vol. III, 38-50; Fonteyne, "Customary International Law Doctrine of Humanitarian Intervention", California Western Int'l.L.Journ., Vol. 4 (1974), 203; Sornarajah, "Internal Colonialism and Humanitarian Intervention", Ga. Journ.Int'l.Comp.L., Vol. 11, 1981, 45-77; Behuniak, "The Law of Unilateral Humanitarian Intervention by Armed Forces: A legal Survey", Military Law Rev., Vol. 79 (1978), 157. See generally works edited by Lillich in *Humanitarian Intervention and the United Nations* (1973).

56. I.C.J. Rep. (1962), 151.

57. *Id.*, 168.

provisions, they have arrogated to themselves the competence to deal with all issues, including those that appear to be essentially within the domestic jurisdiction of Member states in their relevant regions, insofar as such issues affect peace and security in the regions or are related to their stated objectives.<sup>58</sup>

#### Enforcement Action

Under Article 53(1) of the U.N. Charter, the Security Council may utilize the services of a regional organization for enforcement action. However, regional organizations may not undertake enforcement without the prior authorization of the Council.

If upon a petition of a claimant group, a regional organization attempts a settlement, the issue arises as to whether its actions constitute enforcement action under the Charter, and whether such action would require prior authorization of the Security Council. In the case of the OAU, it has been suggested that

The Charter of the (institution) envisaged the concept of a regional organization operating independently of the U.N. and the Security Council in particular. Throughout the Charter not a single reference is made to Articles 52-54 of the U.N. Charter and the collective self-defence principle under Article 57 is completely ignored...The general impression is that the OAU carefully avoided any specific formulations which might remotely suggest that its activities are subject to U.N. control.<sup>59</sup>

On the basis of this thesis, it has been argued that: (1) The organization has no obligation to seek authorization from the Security Council for any enforcement, (2) it is not legally bound to keep the Council "at all times...fully informed" of its enforcement activities or

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58. For a comparative discussion on the operation of the regional institutions see Elias, "The Charter of the OAU", A.J.I.L., Vol. 59 (1965), 243-265, particularly from 253; Franck, "Who Killed Article 2(4)?", A.J.I.L., Vol. 64 (1970), 809-837, from 829 *seq*; Frey-Wouters, *op.cit.*, note 46 *supra*.

59. Okoye, *International Law and the New African States* (1972), 1583; see also 154-174. See Article 54 of the U.N. Charter.

contemplated enforcement activities, and that (3) the Security Council has no legal basis to terminate, at its discretion, any enforcement undertaken by the OAU.<sup>60</sup>

It is submitted that the foregoing arguments are too far-fetched and unacceptable. The constitution of a regional institution need not expressly mention Articles 52-54 of the U.N. Charter for it to be an organization envisaged under Chapter VIII of the Charter. In the case of the OAU the lack of reference to Article 51 of the U.N. Charter is irrelevant particularly because the OAU is not a defence organization even though it has been known to assume quasi-defence roles ~~before~~ (e.g. after the Guinea invasion).

The combined provisions of Articles 39, 41 and 42 of the U.N. Charter suggest that the Security Council can terminate an enforcement action undertaken by the OAU or any regional body, if in the given circumstances it considers that the enforcement constitutes a threat to world peace and security. The OAU Charter which has been registered with the United Nations Secretariat in accordance with Article 102 of the Charter provides that it is the aim of the organization *inter alia* to

promote international co-operation, having regard to the Charter of the United Nations and the Universal Declaration on Human Rights.

The conformity with Article 102 of the United Nations Charter and the references to the latter in the OAU Charter amount to an implicit, if not explicit recognition by the Members of the OAU, that their organization's operation must be consistent with the United Nations Charter provisions including Article 52-54. Such references further constitute an eloquent testimony of the wishes of the OAU Members to adhere to

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60. Tiewul, *op.cit.*, note 17, 286.

the United Nations Charter.<sup>61</sup> The practice of the AOU illustrates these contentions: In May 1973, the organization adopted a resolution reaffirming its "dedication to the purposes and principles of the United Nations Charter *and its acceptance of all obligations contained in the Charter* including financial obligations".<sup>62</sup> In 1965, the OAU again adopted a resolution welcoming, with satisfaction, "the establishment of relations of co-operation" between it and the United Nations.<sup>63</sup> To the extent that the OAU's resolutions are interpretations of its Charter or aimed at implementing it, one would be right to suggest that each resolution is: (1) expressive of the Members' expectations *vis-a-vis* the Charter, and (2) is legally binding on them.<sup>64</sup> By implication, the OAU Members admit the legal relationship between their organization and the United Nations.<sup>65</sup>

During the Congo crisis (second phase), the Security Council observed as noted earlier, that the OAU should be able to resolve problems and disputes that threaten peace and security in Africa within the context of Article 52(1) of the United Nations Charter.<sup>66</sup> The

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61. Elias notes "the reference of the Charter of the U.N. indicates not only the adherence of the members to the principles...but also their awareness of the need to realize the goal of international co-operation in practical terms. *In this respect...the Member States conceive of the organization as necessarily coming within the regional arrangements (of) paragraph 1 of Article 52*" (emphasis mine). Elias, *op.cit.*, note 29, 125.

62. "Resolution on Africa and the United Nations", C.I.A.S. (9.i)III (May 22, 1963) (emphasis mine).

63. AHG/Res. 33 (II).

64. Cervenka, *op.cit.*, note 29, 46. Even though he admits that interpretative resolutions may be "clearly binding" on the Members, Cervenka also advances the general view that where they are not interpretative, OAU resolutions "do not impose any legal obligations: (*id.*, 45).

65. The OAU Charter and the practice of the organization admit the "paramountcy of the obligations of the U.N. membership". (Akindele, "The OAU and the U.N.: A Study of the Problems of Universal-Regional Relationship in the Organization and Maintenance of International Peace and Security", Yearbook of Int'l.Law, Vol. 9 (1971), 30-58, 36.)

66. Note 33 *supra*.

Council made a similar call on the organization when the UDI was declared in Rhodesia.<sup>67</sup> In both cases, the implied relationship between the OAU and Chapter VIII was never contested.<sup>68</sup>

Akehurst suggests that the litmus test for determining whether an arrangement is covered by Chapter VIII of the Charter "is to see whether the parties to the arrangement have claimed that it is a regional arrangement and whether this claim has been accepted by the United Nations".<sup>69</sup> If one accepts Akehurst's test, the definite conclusion would be that the OAU is a Chapter VIII arrangement; because the organization is presented and admitted internationally as a regional body.

The relationship between the other regional institutions and the United Nations does not seem to offer any difficulties. There is a general consensus that the OAS and the Arab League come under Chapter VIII.<sup>70</sup>

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67. 20 U.N.S.C.O.R. Supp. Oct-Dec (1965), 39; U.N. Doc. S/6955 (1965).

68. Some 18 African States submitted a draft resolution to the Security Council asserting that the Congo Crisis was an African issue. It must however be emphasized that what was disputed was not the relationship between the OAU and Chapter VIII (20 U.N. G.A.O.R. Supp. I at 1-5, U.N. Doc. A/6001 (1965)).

69. Akehurst, "Enforcement Action by Regional Agencies, with Special Reference to the OAS", B.Y.I.L., Vol. 42, (1967), 175, 178.

70. *Id.*, 179; Khadduri, "The Arab League and Regional Arrangements", A.J.I.L., Vol. 40 (1946), 756, 770; Macdonald, *op.cit.*, note 26, 245-9. In the case of the Arab League, Israel once objected to defining it as a Chapter VIII organization on the grounds that its activities were not consistent with the provisions of Article 52.

The General Assembly ignored the Israeli protest (see Akehurst, *ibid.*); Claude, "The OAS, the U.N. and the United States", Int.Conc., No. 547 (1964), 1-68; Macdonald, "The Developing Relationship between Superior and Subordinate Political Bodies at the International Level, A Note on the Experience of the U.N. and the OAS", Canadian Yearbook of Int'l.L. (1964), 21-54.

The Definition of Enforcement in Relation to our Prescriptions

Granted that all the regional institutions are subject to Chapter VIII, one still has the problem of defining enforcement action. The phrase is not defined in the Charter. However, the *travaux préparatoires* and a careful reading of the Charter suggest that enforcement action comprises any methods (with the exception of the provisional measures under Article 40) in pursuance of Chapter VII which the Security Council may employ to give effect to its binding resolutions or directives relating to the preservation of peace and security. Article 41 provides that "the Security Council may decide what measures *not involving the use of armed force* are to be employed to give effect to its decisions". Article 42 provides for action by air, land and sea where measures under Article 41 are inadequate. When Articles 41 and 42 are read together, one can infer that enforcement actions as used in the Charter, involves both military and non-military measures.<sup>71</sup>

Arguably, the OAU's economic boycott of South Africa, the Arab League's stand against Israel and the OAS sanctions against the Dominican Republic and Cuba, and the recent deployment of American and Caribbean forces in Grenada, could all be enforcement actions by the respective regional institutions. None of the organizations sought prior Security Council authorization. With the exception of the OAS actions, none was or has been challenged in the United Nations as being contrary to Article 53(1) of the Charter.<sup>72</sup> Even in the case of the OAS, despite

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71. Kelsen, *The Law of the United Nations* (1951), 724; Akehurst, *A Modern Introduction to International Law* (1982), 180. There is, however, a controversy as to whether non-military measures by regional bodies could be classified as enforcement action for the purposes of Article 53. See for instance the American arguments on the OAS sanctions against the Dominican Republic in 1960 and against Cuba in 1962 in the debates in S.C.O.R., 15th year, July, August, September Supp; (196)), and S.C.O.R. 17th year, January, February, March, Supp. (1962), respectively.

72. In 1948 the U.S. however, challenged the propriety of the Arab League's intervention in Palestine on the grounds of the absence  
(contd)

its use of force in Cuba, the organization emerged with hardly any rebukes from the Council. In the case of Grenada, however, the deployment of American and Caribbean forces attracted considerable international concern. Despite the Grenada issue, it could still be argued (i.e. on the basis of other previous cases) that the Council seems to have "rejected black letter interpretations in favour of broad teleological constructions that are everywhere recognized as appropriate to constitutional exposition",<sup>73</sup> and that "as regards enforcement at the regional level, it may be said that the accommodation thus far worked out reflects continuing decentralization in the world community".<sup>74</sup> On the evidence available, it may well be that today, the prior authorization requirement under Article 53(1) exists only in theory<sup>75</sup> despite its great significance to the United Nations system.<sup>76</sup>

However one construes the meaning, it is doubtful whether a *reconciliatory* role of a regional institution would amount to 'enforcement action'. On the other hand, it is perhaps possible to argue that

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72. (contd) of prior authorization under Article 52(1). But since then, the League's activities in relation to the Palestinian Question has never been challenged again (see Higgins, *op.cit.*, note 55, 169). For a treatment of the Security Council debates on the actions of the OAS in respect of Guatemala, the Dominican Republic and Cuba, see R.St.J.McDonald, *op.cit.*, note 70. For formal sources on the cases see note 71 *supra* (The Dominican Case); S.C.O.R. 9th year, April-June Supp. 1954 (Guatemala); S.C.O.R. (1962), 991st meeting -1024th meeting (Cuba).

73. MacDonald, *id.*, 94.

74. *Ibid.* There is however the view that regional "peace keeping" actions such as the U.S. invasion of Grenada (on 24 October 1983), are not directed against a government as sanctions, but instead are focused on restoring order and orderly processes of self-determination. They are therefore not enforcement actions. (Moore, "Grenada and the International Double Standard", A.J.I.L., Vol. 78 (1984), 145,155,163.) But see also Joyner, "The United States' Action in Grenada, Reflections on the Lawfulness of Invasion", *id.*, 131-144.

75. In the view of Claude, Article 53 has virtually been repealed (*op.cit.*, note 70), MacDonald also notes that "Article 53 has been cast aside" (*id.*, 54).

76. Halderman, "Regional Enforcement Measures and the United Nations", Georgetown Law Journ., Vol. 52 (1963), 89-119.

where an organization decides to exert pressure, coercive or otherwise on a member state to remedy alleged violations of human rights, any measures taken in this respect could amount to enforcement under Article 53(1). Given the uncertainties about the meaning and content of enforcement action, such an argument is necessarily inconclusive. In any case, on the basis of the experience of the OAS and the American-Caribbean action in Grenada, it is correct to suggest that the current trend is that regional institutions "may invoke wide-ranging measures of coercion provided only that they observe their own procedural due process provisions together with the purposes and principles of the Charter".<sup>77</sup> On the basis of the foregoing it is submitted that in the settlement of post-colonial self-determination disputes, regional institutions need not seek prior Security Council authorization.

#### The Rationale for Regional Remedies

The requirement to exhaust remedies through regional action is desirable for a number of reasons. A regional institution could constitute a vital diplomatic pressure group. By its (i.e. regional group's) actions, the parent state could be made to change its offensive human rights policies towards a claimant group. Regional action therefore provides a forum in which the parties to a self-determination dispute could find alternative solutions.

By their proximity, the members of a regional institution are more likely to be conversant with the cultural, historical and economic aspects of a given problem. It is therefore prudent to take advantage

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77. MacDonald, *op.cit.*, note 70, 49. Slater, however, argues that "perhaps the Dominican experience is more of a warning than a precedent and that it signifies that probably the role of the organization in interstate and intrastate political conflicts has entered at least a temporary decline" ("The Limits of Legitimations in International Organizations: The OAS and the Dominican Crisis", *Int. Org.*, Vol. 23 (1969), 69. See also Nanda, "The United States Action in the 1965 Dominican Crisis, Impact on World Order", *Denver L.Rev.*, Vol. 43 (1966), 439.



of the "regional expertise" and give the regional institutions the chance to settle such disputes. By reason of their regional identification, they are more likely to find a negotiated settlement.

An institutionalized role for regional bodies could also help to prevent unilateral intervention in separatist conflicts and minimise the possibility of full scale violence, usually associated with several separatist claims.<sup>78</sup>

It is conceded that in the resolution of separatist disputes the experience of the OAU indicates that the actions of the regional institution may be dictated more by the peculiar national interests of its members than their respect for human rights.<sup>78</sup> However, this fact does not necessarily undermine the desirability and possibility of securing solutions to separatist conflicts through regional action.

The requirement of exhaustion of "regional remedies" may not offer easy solutions to self-determinational claims in the post-colonial era; this notwithstanding, regional institutions could still be useful. The

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78. Bloomfield, "The Inter-American System. Does it have a Future?", in Farer (ed.), *The Future of the Inter-American System* (1979), 3, 116. "Regional pacifying and humanitarian operations aimed to minimize violence may become increasingly important...Regional organizations must develop effective procedures for the protection of human rights, so that the unilateral use of force against a member state can be avoided". See also Kourula, "Peace Keeping and Regional Arrangements in U.N. Peace-Keeping". Antonio Cassese (ed.), *Legal Essays* (1978), 95, 118-119. "In most cases, it seems better to accept a regional peace keeping operation than an unrestricted civil violence as the arbiter of self-determination"

79. See Frey-Wouters, "The very act of establishing a regional presence will probably affect the outcome of the conflict. The dilemma of a regional organization in internal conflicts is that, while it should be committed to non-partisan objectives, its actions may turn out to benefit one party more than the other" (*op.cit.*, note 24, 489). See also her comment at *id.* 488, 490. Frey-Wouters also takes the view that in some cases, regional partisan involvement for protection of human rights ought to be permissible (489). But see Schwenninger, "The 1980s New Doctrines of Intervention or New Norms of Non-Intervention?", *Rutgers Law Rev.*, Vol. 33 (1981), 423, 428-29 for the view that "the regional organization must not support a repressive government".

global machinery for conflict resolution is rather slow. For this reason, regional community action offers an appropriate forum for immediate international response to such conflicts. In any case, the complexities of some internal conflicts require a corresponding depth of localized expertise and the need for some decentralization of the international machinery through regional institutions.<sup>80</sup>

One must admit that "the structure and political realities of regional organizations indicate that the possibilities for attaining effective management of civil strife through regional efforts are limited".<sup>81</sup> Nevertheless, it is useful to stipulate the feasible responses for regional action through the exhaustion of regional remedies even if these responses fall short of desirable solutions before resorting to global institutions.

#### GLOBAL INSTITUTIONS

Where regional action fails to secure protection for a group, the latter may resort to global institutions. In such circumstances, it is recommended that the appropriate institution could be the U.N. Sub-Commission for the Prevention of Discrimination and the Protection of Minorities. The Sub-Commission possesses the structural and operational arrangements which could be suitably employed for our recommended scheme.

The Sub-Commission as established in 1947 is a subsidiary of the U.N. Commission on Human Rights. It is a body of experts who act in their individual capacities. It is charged to:

- a. undertake studies particularly in the light of the Universal Declaration on Human Rights and to make recommendations to the Commission on Human Rights of any kind relating to Human Rights and fundamental

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80. Frey-Wouters, *op.cit.* (1974), note 24, 479.

81. Miller, *op.cit.*, note 14, 582.

freedom and the protection of racial, national, religious and linguistic minorities;

- b. and to perform any other function which may be entrusted to it by ECOSOC or the Commission.<sup>82</sup>

Its terms of reference would include studies involving genocide, cultural genocide and racial discrimination. Furthermore, by virtue of ECOSOC Resolution 1159 (XLV) the meetings of the sub-commission may be attended by observers from *inter alia*, the regional organizations. The sub-commission thus offers: (1) a broad field of action that covers the violations of the minimum content rights recommended, (2) the use of international experts in assessing alleged violations, and (3) continued regional involvement through regional observership.

The petition of a claimant group could be treated as *communications* subject to the procedural requirements of the sub-commission under Resolutions I (XXIV) and Res. 2 (XXIV).

In pursuance of ECOSOC Resolution 1503 (XLVIII), Resolution 2 (XXIV) of the Sub-Commission establishes a working group of five members to assess all communications submitted to the Sub-Commission. For a communication to be admissible, Resolution I (XXIV) provides that the working group must assess it in terms of:

- (1) the source
- (2) subject matter
- (3) contents
- (4) exhaustion of domestic remedies
- (5) consistency with the action of international agencies.

Each of these elements may be examined specifically in relation to the admission of claims in our scheme.

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82. For a detailed discussion on the historical background and the work of the Sub-Commission see Sohn and Buergenthal, *op.cit.*, note 43, *supra*, 744-722. See also Humphrey, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The Nature and Status of the Sub-Commission on Prevention of Discrimination and Protection of Minorities", *Int. Org.*, Vol. 5 (1951), 300-312; Hoare, "The U.N. Commission on Human Rights", in Luard, *The International Protection of Human Rights* (1967), 59-98; Salzberg, "A Report on the 22nd Session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities", *Revue des Droits de L'homme*, Vol. 3 (1970), 129.

### Source of Communication

Under paragraph 2(a) a communication is admissible from the following sources:

1. persons or groups whom "it can be reasonably presumed" are victims of the violations alleged.
2. Persons with direct knowledge of the violations.
3. Non-governmental organizations with direct and reliable knowledge of the violations provided they act in good faith.
4. Individuals, with secondhand knowledge of the violations who support it with clear evidence.

An aggrieved group could thus submit a communication through its own representatives or through any other agency. However, within our scheme, alleged violations if not redressed could eventually constitute the basis for a remedial secession. It is therefore recommended that the most appropriate source of communication is the claimant itself through its own representatives. This is because, by its very delicate nature a (prospective) secessionist claim ought to preclude any external support in the formulation or articulation of the basis of the action. This would help eliminate suspicions and accusations of external instigations for the claim.

In the case of Bangladesh, one sees that the claimant did not make any direct submission to the sub-commission. It has been indicated earlier that twenty-two non-governmental organizations requested the sub-commission to investigate the issue and to make appropriate recommendations to the Human Rights Commission.<sup>83</sup> Within the same period, a representative of the International Commission of Jurists spoke before the sub-commission on behalf of the NGOs and quoted eye witness accounts of the alleged atrocities in East Pakistan.<sup>84</sup> The

83. U.N. Doc.E/CN 4/sub.2/NGO 46 (23 July 1971), see page 148, *supra*.

84. The representative was John Salzberg. For his testimony see  
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sub-commission, as noted earlier, did not act on the Bangladesh case.

Bangladesh, however was not subject to the procedural requirements of Resolution L(XXIV). The case came before the sub-commission in August 1971, but the Resolution adopted during that annual session became operative in August 1972. It is not clear whether the sub-commission would have acted if it had arisen in 1972. Secondly, the submissions to the sub-commission came four months after the declaration of secession by Bangladesh.

Unlike Bangladesh, claimant groups in our scheme would be required to petition the sub-commission directly.

#### Subject Matter

Under paragraph 1 of Resolution o (XXIV) the communication must -

- (a) reveal a consistent pattern of gross and reliably attested violations of human rights;
- (b) not be inconsistent with the relevant principles of the Charter, of the Universal Declaration on Human Rights and of the applicable instruments in the field of Human Rights.

(a) Consistent Pattern: A communication before the sub-commission is admissible if it alleges a set of gross violations likely to reveal a "consistent pattern". However, where it alleges instead a single violation, it could still be admissible if it is sustained by other communications asserting similar infringements which when considered together reveal the "consistent pattern".<sup>85</sup>

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84. (contd) *Bangladesh Documents* (Publication by the External Affairs Ministry, New Delhi (1971), 604-668.) See also the comments by Slazberg, in "U.N. Prevention of Human Rights Violations, the Bangladesh Case", *Int.Org.*, Vol. 27 (1973), 115.

85. Cassese, "The Admissibility of Communications to the United Nations on Human Rights Violations", *Revue des Droits de L'homme*, Vol. 5 (1972), 375-393, 378.

In cases of genocide, cultural genocide or racial discrimination the very nature of the violations require a systematic set of actions to constitute the consistent pattern. A claimant would therefore have little difficulty in establishing the consistency of the violations.

(b) Consistency with the relevant principles of the Charter: Where it is possible to establish a consistent pattern of gross violations, it is difficult to imagine how the communication would be inconsistent with the relevant principles of the Charter. Perhaps one may argue that the reference to the Charter relates to the provisions of Article 2(7). However, it would be hard to sustain this argument because "it is definitely the practice of the U.N. to take the position that massive flagrant infringements of human rights are of international concern".<sup>86</sup>

During the discussions on the drafting of Resolution 1 (XXIV) some members of the Committee made references to the limitations imposed by Article 2(7) in international law. However, the general view was that Article 2(7) could not be invoked to make a communication inadmissible.<sup>87</sup> The reference to the Charter therefore does not appear to relate to Article 2(7).

There is the general view that the reference to the Charter could be similar to the provision of Article 29(3) of the Declaration on Human Rights. This view draws strength from the preparatory work of the drafting discussions. During the drafting, it was apparent that the reference to the Charter was to be given the same value as the reference to the purposes and principles of the United Nations in

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86. *Id.*, 379; Jones, *op.cit.*, note 50, 44, 62.

87. See for instance statements by experts from the following states: France (E/CN.4, Sub.2/SR.615) at 38,, Upper Volta (SR 615 at 40), Philippines (*id.*, 41), Austria, *id.* (44), Chile (*id.*, 48).

Article 29(3) of the Declaration on Human Rights.<sup>88</sup> On the basis of this, Cassese suggests that the reference to the Charter principles could "mean that communications are inadmissible if their authors complain of restrictions of substantive rights which are actually justified by the need to prevent rights and freedoms from being used contrary to the purposes and principles of the U.N. Charter".<sup>89</sup>

If one accepts Cassese's interpretations, there can hardly be any difficulty in admitting the communication of a claimant group. The violations of the recommended minimum content of human rights in any circumstances can hardly be justified by the need to "prevent rights and freedoms from being used contrary to the purposes and principles of the U.N. Charter".

Paragraph 1(a) of the resolution also makes reference to consistency "within international instruments in the field of human rights". The resolution does not define what these "international instruments" are. However, during the drafting discussions the Soviet expert observed with approval that the violation of the Conventions on Genocide, Racial Discrimination or the Universal Declaration on Human Rights, would *prima facie* make a communication admissible.<sup>90</sup> The instruments referred to would therefore seem to be the international conventions, declarations and resolutions on Human Rights. In the view of Cassese such instruments are meant to be guidelines as to the nature of violations the sub-commission would deal with.<sup>91</sup> Granted that this interpretation is correct, a communication based on the violations of the recommended minimum content would be consistent with the resolution since the relevant human rights are covered by the

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88. The observations of the Austrian expert, E/CN4 Sub.2/SR 620 at 9.

89. Cassese, *op.cit.*, note 85, 55.

90. E/CN4/Sub 2/SR, 620 at 94.

91. Cassese, *op.cit.*, note 85, 382.

international instruments in question.

### The Contents of the Communication

Paragraph 3 of the resolution provides that, to be admissible a communication must contain the following:

- a. Description of the facts
- b. The nature of the rights violated
- c. The purpose of the petition.

#### (a) The Description of the Facts and the Nature of the Rights Violated

The description of the facts of the violations alleged by a claimant group must necessarily be a principal part of the contents of the communication. A factual description of the violations constitutes the most effective way of stating a group's case and the only way to acquaint the sub-commission with a given situation before it decides to act. But the group need not specify the technical nature of the rights violated since the description of the facts in the communication would reveal the nature of the violations and the rights involved.

#### (b) The Purpose of the Communication

The purpose of a petition ought to be determined by the remedial powers of the body petitioned. Normally the purpose of a communication relating to the violation of human rights would be to secure the termination of the violations. However the sub-commission has no authority to institute on-site investigations or to intercede directly with governments against whom a communication is submitted.<sup>92</sup> Within its mandate under ECOSOC Resolution 1235 and 1503, the sub-commission only receives communications:

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92. Hannum, "The Thirty-Third Session of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities", A.J.I.L., Vol 75 (1981), 176.



with the view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission.

The purpose of a communication by a claimant could thus be to require the sub-commission to verify the existence of a 'consistent pattern of gross and reliably attested violations' for which the group has found no remedies and to bring the matter to the attention of the United Nations Commission on Human Rights.

#### Non-Abusive Content

Under paragraph 36 of Resolution 1 (XXIV) a communication must not be abusive. No definition of "abuse" is given in this context so much would depend on the discretion of the working group of the sub-commission. However where a *prima facie* case of consistent violations is established it is doubtful whether a communication would be rejected simply because the claimant group was abusive.

#### Exhaustion of Domestic Remedies

Paragraph 4(b) of Resolution 1 (XXIV) provides that a communication is inadmissible "if domestic remedies have not been exhausted unless it appears that such remedies would be ineffective or unnecessarily prolonged". Where the authors allege that domestic remedies have been exhausted or were ineffective they have to establish this satisfactorily. Within our recommended scheme, the exhaustion of domestic and regional remedies are conditions that must be met by claimant groups before resorting to global institutions. The action of the claimants within the scheme would therefore be consistent with the requirements of paragraph 4(b) of Resolution 1 (XXIV).

#### Consistency with the Functions of the Specialised Agencies

Within the provisions of paragraph 4(a) of Resolution 1 (XXIV)

"Communications shall be inadmissible if their admission would prejudice the function of a specialized agency of the U.N." Under the scheme recommended in this work the only United Nations agency whose function could be of relevance with regard to this provision is the I.L.O. by virtue of its Convention 107 concerning the issue of cultural genocide.

Under Articles 24-26 of the I.L.O. Constitution, a case of violation by a member state of any of the I.L.O. Conventions of which it is a party must be dealt with in one of two ways:

1. through a submission by a representative of an industrial organization of workers or employees;
2. through a complaint by a state party delegate at the I.L.O. Conference.

It must however be emphasized that the submissions of workers or employees only relate to the protection of trade union rights. In the case of a substantive instrument such as Convention 107, the I.L.O. only acts on the complaints of member state delegates. Thus a claimant group cannot resort to the I.L.O. without the active representation of a friendly state.

The resolution does not define the instances in which an admission of a communication could be prejudicial to the functions of a specialized agency such as the I.L.O. However, it has been suggested that a prejudice may arise where the sub-commission admits a petition which is simultaneously being dealt with by an agency or which the latter has temporarily turned down for procedural reasons.<sup>93</sup> It would therefore be prejudicial to the functions of the I.L.O. if the sub-commission were to admit a group's communication while a state third party was pursuing the issue before the I.L.O. on behalf of the claimant.

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93. Cassese, *op.cit.*, note 85, 385.

On the other hand, there would be no prejudice to the ILO where:

- 1) no state brings up the issue on behalf of the claimant group at the I.L.O. Conference,
- 2) where the I.L.O. rejects the case of the group on substantive grounds, or
- 3) where it rejects the case of the group on procedural grounds and indicates that it has finished with it.

In any of these three situations the communication of a claimant group would be admissible within the requirements of paragraph 4(a).

#### Possible Reactions of the Sub-Commission

As indicated earlier, the sub-commission has no authority to grant any form of remedy or to conduct any on-site investigations. In pursuance of its mandate the sub-commission would only submit the claimant's communication to the United Nations Commission for Human Rights, for consideration and subsequent recommendations to ECOSOC.

During the 1981 Session, it was suggested that the status of the sub-commission should be changed to 'Committee of Experts on Human Rights'. Under this suggestion the committee would report directly to ECOSOC and only communicate its recommendations to the Commission.<sup>94</sup> If this suggestion is adopted the sub-commission would be able to move quickly in dealing with issues submitted to it.

As things stand today, the U.N. Commission on Human Rights deals with all cases of human rights violations reported to it by the sub-commission. The commission's work in this regard is within the framework of its Resolution 1 (XXIII) and ECOSOC Resolutions 1235 and 1503.

Under Resolutions 1235, the Commission sought and was granted

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94. U.N. Doc. E/CN.4/Sub 2/SR896 at 5 (1981).

authority

to examine information relevant to gross violations of human rights and fundamental freedoms and to make a thorough study of situations which reveal a consistent pattern of violation of human rights as exemplified in Namibia, South Africa and Rhodesia.

Under Resolution 1503, the Commission upon receipt of the report of the Sub-Commission determines:

1. Whether the reported situation requires a thorough study and a report and recommendations thereon to the Council, or
2. Whether it is an appropriate subject of an investigation by an ad hoc committee.

When the Commission decides that a situation requires investigation by an ad hoc committee, Resolution 1503 provides that the investigations can only be undertaken with the express consent of the state concerned and with its close co-operation and after the exhaustion of domestic remedies. The Commission's actions under the resolution are confidential.

Where there have been gross violations of human rights which could provide the basis for a self-determination claim, it is most unlikely that the state concerned would admit an investigating team which is likely to confirm the allegations of the victim group. However, the Commission could still investigate the allegations with the aid of eye witnesses. After its investigations, the Commission, within its scope of operation, would make a report on the situation to ECOSOC which may then bring the matter to the attention of the General Assembly or to the Security Council where it threatens international peace and security.

The emphasis here is on bringing the situation of gross violations of human rights to the attention of the General Assembly and the Security Council. It is important to note that within the

post-colonial context and indeed within any other context, it is beyond the legal authority of any international organization to purport to make a grant of separatist self-determination to a section of the population and integral territory of a sovereign state. The purpose of the procedural requirements is to enable claimants and states to explore alternative remedies at the national, regional and global levels. Where a group fails to secure any remedies its legitimate right to self-determination could be said to have matured.

### CONCLUSION

In the post-colonial context, we recommend support for self-determination in circumstances that indicate that no preferable alternative solutions are available to protect the rights of the claimant group. The existence of such circumstances could be objectively verified through procedural criteria that require the exhaustion of national, regional and global remedies.

The purpose of the procedural scheme is to provide a comprehensive framework comprising concentric levels of conflict settlement institutions within which claimants and parent states may be able to find solutions to self-determination conflicts. The need to address initial grievances to national institutions is primary and fulfils the general international law requirement of the exhaustion of local remedies. The requirement for regional remedies in our scheme is consistent with the United Nations Charter provisions on the role of regional organization in the resolution of regional-based conflicts. Such organizations provide a useful source of regional expertise in mediation efforts. Apart from discouraging unilateral intervention in self-determination conflicts, the organizations also constitute institutional barriers to "extra-regional" intervention. Even though

they are not always successful in their efforts, they are undoubtedly vital in strategies for conflict resolution. Global institutions on the other hand provide "extra-regional" fora for pursuing solutions.

Where self-determination is claimed as a feature of a territorial dispute (as for example, in the case of East Timor, Western Sahara, Palestine and the Ogaden), the establishment of a separate state is usually the only remedy sought. Thus unlike the situation in respect of claims based on gross violations of human rights, the procedural criteria we have recommended do not provide alternative forms of remedy as such, because by the nature of the conflicts, only secessionist self-determination stands out as the remedy. The concentric procedural scheme recommended is nevertheless useful in the case of these claimants because it provides a framework to regulate their claims with the view to discouraging or minimising self-help measures.

In the framework of conflict resolution, the degree of legitimacy of a claim for a particular form of remedy is considerably enhanced by the absence of alternative forms of remedy. Thus where a claimant, subject to a persistent pattern of gross violations of human rights, fails to obtain any redress through exhaustion of national, regional and global remedies (remedial) self-determination becomes its only means of protection. A claim in such circumstances merits sympathetic international support.

## GENERAL CONCLUSION

Since 1945, self-determination has become a putative legal right in international law, emphasizing decolonization. In this context, the normative character of self-determination and its exact confines as *lex lata* are hardly disputable. Its beneficiaries are colonial units. To identify such units, the United Nations adopts a geopolitical or territorial criterion as the basis of delimitation. Thus colonial peoples as beneficiaries of self-determination are the residents of a given colonial unit in their collectivity, irrespective of their ethnic, linguistic or other cultural differences. There have been exceptions to this general approach in a few category of cases where strong divisive tendencies necessitated a delimitation of the beneficiary units on ethnic or religious bases.

In the context of decolonization, self-determination enjoys primacy over other competing values in international law. Thus as a general rule, a plea of domestic jurisdiction is not considered a bar to international concern over issues of self-determination. Similarly, where peaceful means for pursuing self-determination by a colonial unit are exhausted, the general practice of the United Nations favours the use of force by the unit despite the prohibition of the use of force in international relations. On the other hand, a colonial power is barred from suppressing demands for self-determination by a unit either by force or by any other means. In decolonization, self-determination also pre-empts claims of territorial integrity made by an existing state over the territory of a colonial unit. This however, excludes a special regime of cases, namely: colonial enclaves, leased territories, territories which are the subjects of treaty obligations and "plantations".

A unit exercises self-determination by either opting for complete independence, or for association with, or intergration into, an existing state. The exercise of self-determination by a unit and its subsequent removal from the domination of the ruling power is considered a condition precedent to the enjoyment of equal rights and fundamental human rights. There is thus a close link between these values and self-determination. The remarkable success of the application of self-determination in decolonization has underscored this link. Thus in modern times, self-determination is commonly regarded as a significant feature of the notion of human rights.

Just as the emergence of self-determination after 1945 provided the basis for decolonization, its subsequent consolidation in international law, its close relationship with human rights, and the propagation of its inherent democratic ideals as the right of all peoples to determine their own political future, have in turn led to the emergence of a regime of aspirant beneficiaries; this time within the frontiers of the new states (i.e. former colonies). The success of the principle since 1945 has also strengthened the aspirations of the older nationalities of Europe whose hopes for independent or autonomous existence have never been fulfilled since the beginning of the century. These new aspirants include tribes, minorities, nationalities and other forms of ethnic associations, who for one reason or another desire total or partial separation from their parent states.

To the extent that they are not "colonial peoples" these claimants fall outside the traditional category of beneficiaries of self-determination. The question then is, is it desirable for international law to recognize a right of self-determination for such groups? In a world based on the unified state system, the idea of a people's



right of self-determination against the sovereign state is considered a spectre and a fundamental ingredient of instability and chaos. On the other hand, we adopt the view that in a world where oppression and violence are very much a part of community relationships, the recognition of a right to self-determination outside the colonial context, within specific confines and for clearly defined goals would be useful. This is not to say that the objections and fears raised against post-colonial self-determination are baseless. What is meant is that on the balance, there is much to be said for the recognition of the principle beyond decolonization. The persistence of claims, the attendant violent conflicts that usually threaten international peace and security, and the need to protect basic human rights make it prudent to admit the right of post-colonial self-determination as a matter of international public policy and to evolve appropriate prescriptions to regulate claims and counter-claims.

It is thus suggested that in the post-colonial context, self-determination could be applied in relation to two community goals - the protection and promotion of basic human rights and the peaceful settlement of certain types of territorial disputes. We therefore recommend support for a claim of post-colonial self-determination where a claimant is subject to genocide or ethnocide, and for claimants who are victims of racial discrimination (and who seek equality in their state system as opposed to secession from it).

In each given claim however, the interests of the claimants must be balanced with the interests of the parent community and the requirements of world order. A claim may therefore be supported only in conditions where there is evidence that the claimant has been subject to persistent and gross violations of human rights. In such circumstances, the interests of the claimants must be considered pre-emptory.

Where there is no such evidence, the interests of the parent community and the dictates of world order must prevail as against the demands of the claimants.

For the settlement of territorial disputes, we recommend support where self-determination was not settled before the withdrawal of a colonial power and a colonial unit subsequently becomes the subject of a territorial dispute (e.g. Timor) or where the settlement of a given dispute involves a possible transfer of population (e.g. Falklands, Ogaden). Claims may also be supported in cases that involve the recovery of territory from occupation (e.g. Palestine) or where a claim is founded on absence of consent of the claimant for its original association with the parent community (e.g. Eritrea).

For a claim to merit support, the establishment of a *prima facie* case by the claimants would not be enough. The claimant must submit to a set of substantive and procedural conditions. The former conditions ensure conformity with principles of international law in the creation of states. The procedural conditions comprise the need to exploit remedies offered by national, regional and global institutions, to provide avenues for alternative solutions and an institutional mechanism for discouraging self-help measures pending the peaceful resolution of claims. A claim merits international support only when it can be demonstrated that it meets both the substantive and procedural conditions.

In advocating the recognition of post-colonial self-determination, the purpose is not to seek a dismantling of the international state system. It is rather a call for the international community to reassess its approach to self-determination in the post-colonial context and to address itself to the fact that self-determination is a dynamic concept. While its inherent ideal of the right of *all peoples* to

determine their own political future has remained unchanged over the years, the nature of its beneficiaries changes according to the context in which the principle is applied. Nationalities of Europe were regarded as the primary subjects of self-determination up to the beginning of the twentieth century. After WWI, nationalities, minorities and mandates were admitted as legitimate subjects of self-determination (albeit in varied terms). The scope of self-determination was extended to include occupied territories and all non-self-governing peoples after WWII. The only common denominator among these diverse groups was the fact that they were all either dominated, oppressed or non-self-governing. In modern times, it is reasonable to suggest that the world community ought to recognize the flexibility of self-determination and to support its applicability in situations characterized by oppression or domination reminiscent of previous situations in which the principle had been applied. Given the recurrent nature of post-colonial self-determination claims, the evolution of appropriate institutional mechanisms to regulate claims and counter-claims would help to remove violence as the only alternative for pursuing claims.

We introduced the subject for this dissertation with the observation that "of ideas, concepts and principles evolved in the twentieth century, few have produced an impact so great as that of national self-determination". It may well be added that given the growing recognition of the close links between human rights and self-determination in modern times, and the ever increasing demands for respect for human rights and human dignity, the full impact of self-determination is yet to be felt. In the latter years of the twentieth century the international community is bound to witness increasing demands for post-colonial self-determination. The earlier it faces up to this reality and examines the strategies for dealing with it the better.

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GENERAL ASSEMBLY RESOLUTION 742(VIII). ANNEX.  
LIST OF FACTORS INDICATIVE OF THE ATTAINMENT OF  
INDEPENDENCE OR OF OTHER SEPARATE SYSTEMS OF SELF-  
GOVERNMENT.

First Part. Factors indicative of the attainment of in-  
dependence.

A. International status

1. International responsibility. Full international responsibility of the Territory for the acts inherent in the exercise of its external sovereignty and for the corresponding acts in the administration of its internal affairs.
2. Eligibility for membership in the United Nations.
3. General international relations. Power to enter into direct relations of every kind with other governments and with international institutions and to negotiate, sign and ratify international instruments.
4. National defence. Sovereign right to provide for its national defence.

B. Internal self-government.

1. Form of government. Complete freedom of the people of the Territory to choose the form of self-government which they desire.
2. Territorial government. Freedom from control or interference by the government of another State in respect of the internal government (legislature, executive, judiciary, and administration of the Territory).
3. Economic, social and cultural jurisdiction. Complete autonomy in respect of economic, social and cultural affairs.

Second Part. Factors indicative of the attainment of  
other separate systems of self-government.

A. General.

1. Opinion of the population. The opinion of the population of the Territory, freely expressed by informed and democratic processes, as to the status or change in status which they desire.
2. Freedom of choice. Freedom of choosing on the basis of the right of self-determination of peoples between several possibilities, including independence.
3. Voluntary limitation of sovereignty. Degree of evidence that the attribute or attributes of sovereignty which are not individually exercised will be collectively exercised by the larger entity thus associated and the freedom of the population of a Territory which has associated itself with the metropolitan country to modify at any time this status through the expression of their will by democratic means.
4. Geographical considerations. Extent to which the



relations of the Non-Self-Governing Territory with the capital of the metropolitan government may be affected by circumstances arising out of their respective geographical positions, such as separation by land, sea or other natural obstacles; and extent to which the interests of boundary States may be affected, bearing in mind the general principle of good-neighbourliness referred to in Article 74 of the Charter.

5. Ethnic and cultural considerations. Extent to which the populations are of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from the peoples of the country with which they freely associate themselves.

6. Political advancement. Political advancement of the population sufficient to enable them to decide upon the future destiny of the Territory with due knowledge.

## B. International status.

1. General international relations. Degree or extent to which the Territory exercises the power to enter freely into direct relations of every kind with other governments and with international institutions and to negotiate, sign and ratify international instruments freely. Degree or extent to which the metropolitan country is bound, through constitutional provisions or legislative means, by the freely expressed wishes of the Territory in negotiating, signing and ratifying international conventions which may influence conditions in the Territory.

2. Change of political status. The right of the metropolitan country or the Territory to change the political status of that Territory in the light of the consideration whether that Territory is or is not subject to any claim or litigation on the part of another State.

3. Eligibility for membership in the United Nations.

## C. Internal self-government.

1. Territorial government. Nature and measure of control or interference, if any, by the government of another State in respect of the internal government, for example, in respect of the following:

Legislature: The enactment of laws for the Territory by an indigenous body whether fully elected by free and democratic processes or lawfully constituted in a manner receiving the free consent of the population;

Executive: The selection of members of the executive branch of the government by the competent authority in the Territory receiving consent of the indigenous population, whether that authority is hereditary or elected, having regard also to the nature and measure of control, if any, by an outside agency on that authority, whether directly or indirectly exercised in the constitution and conduct of the executive branch of the government;

Judiciary: The establishment of courts of law and the selection of judges.

2. Participation of the population. Effective participation of the population in the government of the Territory: (a) Is there an adequate and appropriate electoral and representative system? (b) Is this electoral system conducted without direct or indirect interference from a foreign government?

3. Economic, social and cultural jurisdiction. Degree of autonomy in respect of economic, social and cultural affairs, as illustrated by the degree of freedom from economic pressure as exercised, for example, by a foreign minority group which, by virtue of the help of a foreign Power, has acquired a privileged economic status prejudicial to the general economic interest of the people of the Territory, and by the degree of freedom and lack of discrimination against the indigenous population of the Territory in social legislation and social developments.

Third Part. Factors indicative of the free association of a Territory on equal basis with the metropolitan or other country as an integral part of that country or in any other form.

A. General.

1. Opinion of the population. The opinion of the population of the Territory, freely expressed by informed and democratic processes, as to the status or change in status which they desire.

2. Freedom of choice. The freedom of the population of a Non-Self-Governing Territory which has associated itself with the metropolitan country as an integral part of that country or in any other form to modify this status through the expression of their will by democratic means.

3. Geographical considerations. Extent to which the relations of the Territory with the capital of the central government may be affected by circumstances arising out of their respective geographical positions, such as separation by land, sea or other natural obstacles. The right of the metropolitan country or the Territory to change the political status of that Territory in the light of the consideration whether that Territory is or is not subject to any claim or litigation on the part of another State.

4. Ethnic and cultural considerations. Extent to which the population are of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from the peoples of the country with which they freely associate themselves.

5. Political advancement. Political advancement of the population sufficient to enable them to decide upon the future destiny of the Territory with due knowledge.

6. Constitutional considerations. Association by virtue of a treaty or bilateral agreement affecting the status of the Territory, taking into account (i) whether the constitutional guarantees extend equally to the associated Territory, (ii) whether there are powers in certain matters constitutionally reserved to the Territory or to the central authority, and (iii) whether there is provision for the participation of the Territory on a basis of equality in any changes in the constitutional system of the State.

B. Status.

1. Legislative representation. Representation without discrimination in the central legislative organs on the same basis as other inhabitants and regions.

2. Participation of the population. Effective participation of the population in the government of the Territory: (a) Is there an adequate and appropriate electoral and representative system? (b) Is this electoral system conducted without direct or indirect interference from a foreign government?\*

GENERAL ASSEMBLY RESOLUTION 1541(XV). ANNEX.  
 PRINCIPLES WHICH SHOULD GUIDE MEMBERS IN DETERMIN-  
 ING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT  
 THE INFORMATION CALLED FOR IN ARTICLE 73(e) OF THE  
 CHARTER OF THE UNITED NATIONS.

#### Principle I

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73(e) of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

#### Principle II

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government'. As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73(e) continues.

#### Principle III

The obligation to transmit information under Article 73(e) of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

#### Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

#### Principle V

Once it has been established that such a prima facie case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, inter alia, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 (e) of the Charter.

#### Principle VI

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent state;
- (b) Free association with an independent state; or
- (c) Integration with an independent state.

#### Principle VII

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent state the freedom to modify the status of that territory through the expression of their will by democratic

means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

#### Principle VIII

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

#### Principle IX

Integration should have come about in the following circumstances:

- (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its people would have the capacity to make a responsible choice through informed and democratic processes;
- (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes...

### APPENDIX III

#### DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES (General Assembly resolution 1514(XV) of 14 December 1960)

##### The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom, . . .

##### Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

#### APPENDIX IV

#### DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE U.N. (General Assembly resolution 2625(XXV))

#### The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, the realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.

The territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

## APPENDIX V

CLAIMANTS: (1950s-80s)

Claimants	Parent State	Claimants	Parent State
Basques	Spain	Pakistan	India
Catalans	Spain	Bangla Desh	Pakistan
Bretons	France	Mollucans	Indonesia
Occitains	France	Muslim (Mindanao)	Philippines
Corsicans	France	Tamils	Sri Lanka
Scots	Great Britain	Nagas	India
Welsh	Great Britain	Kashmir	India
Scotch-Irish	Northern	Sikhs	India
(Protestants)	Ireland	Sabah	Malaysia
Manx	Great Britain	Sarawak	Malaysia
Jura	Switzerland	Karens	Burma
Walloons	Belgium	Kachins	Burma
Flemings	Belgium		
South Tyrol	Italy		
Senegal	Mali Federation	"Muslims"/Christians	Lebanon
Biafra	Nigeria	Turks	Cyprus
N.Nigeria	Nigeria	Kurds	Iraq
S. Sudan	Sudan	Armenians	Turkey
Eritrea	Ethiopia		
North & South			
Angola	Angola	Croatians	Yugoslavia
Ewe	Togo/Ghana	Montenegrins	Yugoslavia
Huttu	Burundi	Serbs	Yugoslavia
Matanga	Congo	Macedonians	Yugoslavia
Maores	Comoros	Ukrainians	Soviet Union
Luo	Kenya	Magyars	Rumania
Quebec	Canada		
British Columbia	Canada	Blacks	Brazil
Eskimos	Canada	Indians	Brazil
Puerto Rico	U.S.A.	Aborigines	Australia
Indians	U.S.A.		
Black separatists	U.S.A.		







